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February 2, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mark J. Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
U.S. Courthouse
333 Constitution Avenue, NW
Washington, D.C. 20001

Re: *Time Warner Entertainment Co. v. FCC*, No. 94-1035 (argued October 17, 2000)

Dear Mr. Langer:

Pursuant to Federal Rule of Appellate Procedure 28(j), we write to apprise the Court of the recent FCC decision that approved the AOL-Time Warner merger. One aspect of this decision is relevant to petitioners' claim that the FCC's attribution rules are arbitrary, capricious, and unlawful because they concededly apply to ownership interests that have merely the "potential to lead to influence"(Resp. Br. 38), rather than only to those interests that actually confer influence or control over a programming decisions of a third party. Pet. Br. 33-44; Pet. Reply Br. 15-16. In particular, in this recent decision, the FCC applied the very standard that it had disavowed in the Orders under review. After holding that AOL's non-voting interest in DirecTV was not attributable under the FCC's attribution rules, the FCC examined the contracts between AOL and DirecTV to see if AOL in fact possessed "significant influence" over Direct TV, determined that that "these contracts do[] not . . . confer on AOL significant influence over DirecTV's video programming activities," and thus rejected the claims "that AOL's ownership interest . . . will enable the merged firm to harm video programming suppliers and MVPD competitors seeking access to these suppliers." *AOL-TW Order* ¶¶ 214-15. A copy of the *AOL-TW Order* is attached. For your convenience, four copies of this letter are enclosed.

Very truly yours,

David W. Carpenter /LFB

David W. Carpenter
Counsel For Petitioner AT&T Corp.

cc: all parties of record

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee	)))))))))	CS Docket No. 00-30

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 2001 **Released: January 22, 2001***

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani issuing a statement at a later date.

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I. INTRODUCTION

1. In this *Order*, we consider the joint application ("Application")[1] filed by America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") (collectively the "Applicants") for approval to transfer control of certain licenses and authorizations to AOL Time Warner Inc., a newly created company, pursuant to Sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("Communications Act").[2] The licenses to be transferred include the cable television relay service ("CARS") licenses that are essential to the operation of the cable systems currently owned by Time Warner, which are in several respects the critical asset involved in the combination of the two firms. To

[*] The Commission on January 19, 2001 approved the final version of this Memorandum Opinion and Order.

[1] Applications for Consent to the Transfer of Control of Licenses and Section 214 Licenses Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc. ,Transferee, CS Docket No. 00-30 (filed Feb. 11, 2000) ("Application").

[2] 47 U.S.C. §§ 214(a), 310(d). AOL and Time Warner now independently control the licenses and authorizations at issue.

obtain approval, the Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.[3] In this regard, we must weigh the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the benefits outweigh the harms.[4]

2. The proposed merger of AOL and Time Warner was, at the time of its announcement, the largest corporate merger in history.[5] The combination is remarkable not only for its size, but also for the nature of the companies and the assets they control. The proposed merger has attracted substantial public interest and has come under scrutiny by several bodies other than this Commission, including the U.S. Congress, the Federal Trade Commission ("FTC"), and the European Commission. The unprecedented nature of the merger creates more than the normal potential for controversy and confusion both about the merits and about the role of the Commission's review.

3. To minimize potential confusion, we begin with a summary overview of the foundation and context of our decision. We first describe the scope of the Commission's inquiry and its specific focus on potential consequences of approving the proposed transfers on the rules, policies and objectives of the Communications Act, and note several pervasive issues about whether and how those potential consequences should be addressed by this Commission in the context of reviewing license transfer applications. We then briefly note from the standpoint of the Communications Act the most significant aspects of the companies and assets that will combine if the transfers are approved. Having established this context, we describe the major issues that have been identified and will be discussed in the course of the decision.

4. As the Commission has explained in prior merger orders, this Commission and the Federal Trade Commission each have independent authority to examine communications mergers, but the standards governing the Commission's review differ from the FTC's standards.[6] The FTC must examine

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[3] *See* 47 U.S.C. §§ 214(a), 310(d). *See also Applications For Consent To The Transfer Of Control Of Licenses and Section 214 Authorizations From MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Option and Order (*"AT&T-MediaOne Order"*), 15 FCC Rcd 9816, 9817 ¶ 1 (2000); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order ("*SBC-Ameritech Order*"), 14 FCC Rcd 14712, 14736 ¶ 46 (1999), *rev'd in part on other grounds sub nom.* Assoc. of Communications Enterprises v. FCC, No. 99-1441, 2001 WL 20519 (D.C. Cir. Jan. 9, 2001); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order ("*WorldCom-MCI Order*"), 13 FCC Rcd 18025, 18026-27, 18030-32 ¶¶ 1, 8-10 (1998); *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order ("*Bell Atlantic-NYNEX Order*"), 12 FCC Rcd 19985, 19987, 20000-04 ¶¶ 2, 29-32 (1997).

[4] *SBC-Ameritech Order*, 14 FCC Rcd at 14736 ¶ 46; *WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10.

[5] *See, e.g., AOL and Time Warner In Record $350 Billion Merger*, COMM. DAILY, Jan. 11, 2000, at 1; Steven Burke, *AOL, Time Warner Merger: A New Model For Partnerships*, CMP's TECHWEB, Jan. 10, 2000, at http://www.techweb.com/wire/finance/story/INV20000110S0008; Paul Kagan Assoc., Inc., *AOL: You've Got Time Warner*, Kagan, BROADBAND, Jan. 10, 2000.

[6] *Cf. AT&T-MediaOne Order*, 15 FCC Rcd at 9811 ¶ 10 (comparing FCC standards to those employed by Department of Justice); *Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.*, CC Docket No. 98-178, Memorandum Opinion and Order ("*AT&T-TCI Order*"), 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999) (same).

whether a merger will harm competition.[7] The Commission's review encompasses an examination of anticompetitive effects but also evaluates, as explained in more detail below, the potential impact of the proposed transaction on the rules, policies and objectives of the Communications Act.[8] Transactions that would violate the Act will be rejected. Transactions that would violate the Commission's rules may be allowed only if the Commission waives the rules in question. Transactions that do not violate the Act or the Commission's rules are examined to determine whether they would otherwise substantially impair or frustrate the enforcement of the Act or the objectives of the Act and whether the transaction would produce potential public interest benefits in furtherance of Communications Act policies. Among the major policies and objectives that may be affected by significant mergers are preserving and enhancing competition in related markets, ensuring a diversity of voices, and providing advanced telecommunications services to all Americans as quickly as possible. To gain approval, an applicant bears the burden of establishing that the potential for benefits to the public interest outweighs the potential for harms.

5. The balancing of potential harms and benefits to the public interest is particularly appropriate in the context of reviewing license transfer applications that are associated with significant mergers because such mergers are likely to create potential for both good and ill. For example, the same concentration of assets that may support technological innovation by providing sufficient capital to take the necessary risks or by reducing transaction costs may also allow the merged entity to create or enhance barriers to entry by its competitors. As a result of this ambiguity, the outcome most favorable to the public interest, in terms of the policies and objectives of the Communications Act, is often best achieved by allowing the transfers, and thus the associated merger, to proceed (thus obtaining the positive benefits of the combination), but only subject to certain conditions, either voluntarily agreed to or imposed by the Commission under its statutory authority, designed to minimize the potential harms or increase the potential benefits.

6. It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction — i.e., harms and benefits that are "merger-specific." The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.

7. License transfer applications, even those associated with significant mergers, are adjudications focused on particular parties. Some have argued that the Commission should avoid in such proceedings addressing significant issues that also apply to parties in the same industry other than the applicants, and should deal with such industry-wide issues exclusively in rulemakings.[9] They point out the potential unfairness of subjecting the license transfer applicants to a different standard that is not applicable to their competitors and contend that rulemakings may offer a better opportunity for public comment focused on the adoption of an industry-wide policy rather than on the facts of a particular merger. While recognizing the relative advantages of rulemakings in many circumstances, the Commission also recognizes the well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking to decide such issues, and that the Commission must fulfill

[7] *See* 15 U.S.C. § 18.

[8] *See* Section II, *infra* (Public Interest Framework).

[9] *See* Applicants' Reply Comments at 53.

its responsibility in an adjudication to decide the issues presented by that case.[10] In this case, the Commission is required to balance these considerations and resolve them with respect to several of the major issues presented by the facts, including one issue that is currently the subject of a notice of inquiry that may lead to a rulemaking proceeding.

8. The proposed merger has been touted as a productive marriage of a new media giant with a traditional media giant. AOL has become one of the most significant forces in the Internet environment. It is the nation's and the world's largest Internet Service Provider ("ISP"), and serves about five times as many narrowband subscribers as its nearest competitor.[11] AOL initially created and provided an online service, separate and apart from the Internet, which was designed to provide the benefits of connecting to a network of computers, including those of other AOL members and those of AOL itself, that provided collections of information on various subjects. AOL's online service was distinguished both by its emphasis on creating a format that was "user friendly" to persons not otherwise familiar with computer networking and by its aggressive marketing programs, which educated the general public as to the benefits and relative ease of connecting to a computer network. The development and increasing popularity of the World Wide Web eventually led AOL to adapt its service to include access to the broader Internet, transforming AOL into an ISP, and to allow access to AOL's online service over the Internet to persons who used other ISPs. At the same time, AOL has continued as an online service provider ("OSP") to provide a number of resources and services to members who pay a monthly fee. As the use of the Internet has grown in popularity, AOL has continued to attract the largest share of users. Moreover, as the commercial potential of the Internet has been recognized, the value of AOL's large subscriber base has been recognized, as has the value of AOL's ability to attract and hold its members to the services and information provided by AOL itself, as opposed to having them go to other sites on the World Wide Web.[12] AOL's abilities to attract a large number of subscribers, to keep them primarily "inside" its own services, and to negotiate contracts with other businesses that take advantage of these abilities have provided a basis for a profitable business enterprise.

9. Prior to the announcement of the proposed merger with Time Warner, AOL faced a threat to its continued success in the Internet environment as a narrowband ISP and OSP, posed by the anticipated migration of Internet users from narrowband access over ordinary telephone lines to high-speed access. The early leaders in providing high-speed Internet access have been cable television operators which, unlike telephone companies, are not common carriers. High-speed ISP service over cable systems is provided on an exclusive basis by companies owned in large part by the cable companies, and AOL had been unable to negotiate access to the cable systems on terms satisfactory to it. In response, AOL developed relationships with alternative providers of high-speed access, including high-speed Digital Subscriber Line ("DSL") service provided over telephone lines and satellite broadcasting service. In

[10] *See Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, IB Docket No. 98-60, Report and Order, 14 FCC Rcd 3065, 3079 ¶ 38 (1999) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947)).

[11] "Narrowband" Internet service is provided over modems that connect computers to the Internet over traditional telephone lines, which currently allow the transfer of data at speeds of up to 56 kbps.

[12] Some have referred to the effect of AOL's techniques to keep its subscribers within its own services as a "walled garden." AOL's subscribers spend approximately 85% of their time within this walled garden rather than leaving to explore the remainder of the Internet. *See* Holly Becker, *America Online*, Lehman Brothers, June 29, 2000 at 35 ("Lehman Brothers June 29 Report"), cited by Ex Parte Comments of Disney at 14-15, transmitted by letter from Lawrence R. Sidman, Verner, Lipfert, Berhard, McPherson & Hand, to Magalie Roman Salas, Secretary, FCC, dated July 25, 2000.

addition, AOL became the leading voice in a movement led by narrowband ISPs to compel cable operators to allow competing ISPs to provide high-speed access to the Internet over their cable systems.[13]

10. AOL also has the largest share of subscribers to services known as instant messaging ("IM"), which allows subscribers to detect whether other identified subscribers are currently on-line (presence detection), and to send and receive messages to other subscribers in essentially "real" time. There are competing versions of instant messaging software and most, including those controlled by AOL, are offered without charge. It is anticipated that IM will become a significant platform for launching and supporting other applications that take advantage of the tools for presence detection and real-time communication. At present, with a few exceptions, the competing IM systems do not interoperate with one another—*i.e.*, a member of one such system cannot detect the presence of or send messages to a member of a competing system. Competing systems have attempted to interoperate with AOL's system without AOL's consent. While stating its commitment to the principle of interoperability, AOL has blocked these unauthorized efforts, citing concerns for security, privacy and performance of its own system. Finally, AOL has recently begun to provide interactive television services ("ITV") that combine traditional video programming features with web-based and other interactive features, viewed and used by consumers through their television sets.

11. Time Warner is a conglomerate of many of the most successful traditional media companies. It holds one of the world's largest content libraries, comprised of innumerable print, film, television programming, and music interests. Time Warner delivers this content through magazines, records and its cable holdings, the second largest in the nation. In recent years, Time Warner leaped into the new media world by creating, with other cable companies, Road Runner, the nation's second largest broadband ISP, which Time Warner controls. Most of Time Warner's cable systems are owned and operated by Time Warner Entertainment ("TWE"), a partnership in which Time Warner has a 75% stake. As a result of the merger of AT&T Corp. ("AT&T") and MediaOne, AT&T owns the remaining 25%. Thus Time Warner already represents a vertical integration of substantial programming (content) and distribution (conduit) assets.

12. This proposed merger at this particular point raises a number of issues with respect to the policies of the Communications Act that have generated intense public comment. The Internet is widely recognized as a major source of innovation and economic growth in recent years. The conditions which allowed that explosive growth and innovation to occur included substantial initial public investment and an architecture that encouraged innovation by reducing barriers to entry and ensuring competition on the merits. Competition among narrowband ISPs has been open because of the common carrier telephone network over which they offer their services. As already noted, the proposed merger has been motivated in large part by the anticipated migration of ISPs' customers from the regulated common carrier telephone network to broadband conduits, primarily cable systems, which are not common carriers. The policies of the Communications Act that are potentially implicated by this shift, and by this proposed merger, include the preference for competitive telecommunications markets, the existence of diverse platforms and providers, the promotion of innovation, and rapid deployment of advanced telecommunications services.

13. From a competition standpoint, vertical integration can create potential problems when the integrated company has market power at one or more of the levels of integration. Concerns about the

[13] *See In the Matter of Application for Consent to the Transfer of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, AOL Comments at 12-17; *In the Matter of Application for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc, Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, AOL Comments at 30-39.

integration of video programming content and the cable conduit are addressed in statutory provisions and Commission rules, such as the horizontal ownership cap and the channel occupancy rules.[14] These provisions, however, do not necessarily apply to or resolve the similar concerns raised by the proposed merger with respect to the integration of the existing Time Warner combination of content and conduit with AOL's online services in the residential market. As Congress and this Commission have recognized, market power exists on the Time Warner side in the cable assets. On the AOL side, market power arguably exists both in AOL's position as the leading narrowband ISP and in AOL's instant messaging network.

14. A number of the comments reflect fears of the potential anticompetitive impacts that could flow from the unprecedented combination of assets that the merger represents. Our task in evaluating the comments is more difficult because of the rapid development of the technologies and products involved and the ambiguous nature of some of the merger's predicted impacts. For instance, several of the most controversial issues relating to the proposed merger involve products and markets that have only recently developed or that are only anticipated—and yet commenters urge that if some conditions are not placed on the merger at this point, harms will occur so rapidly that much more onerous intervention will be required to cure them later.

15. We recognize that there is a difference between intervention to preserve a level of competition that will allow a market to operate effectively and the kind of substantial regulatory intervention that is required to compensate in markets where sufficient competition is lacking. The 1996 Act reflects a clear preference that competitive markets, as opposed to regulated monopolies, be created and preserved as the mechanism for economic decision making. Mergers can reflect the healthy operation of competition, creating more efficient collections of assets; but they can also threaten its continued existence, eliminating competitors or creating opportunities to disadvantage rivals in anticompetitive ways. We are guided both by the desire to avoid intervention and the realization that some degree of timely intervention to preserve competition may avoid a later need for more onerous intervention to either regulate where competition has disappeared or to attempt to reintroduce competition once it has been eliminated.

16. We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged firm to reduce transaction costs and offer new products; but if the merged firm has market power, these advantages may operate to consolidate that power.

17. In its review of the instant merger, the FTC found that the merger would harm competition in the residential Internet access marketplace and imposed conditions on the merging parties requiring them to afford access to Time Warner's cable plant to unaffiliated ISPs, requiring them not to discriminate against unaffiliated content under certain circumstances, requiring AOL Time Warner to market AOL's DSL services in the same manner and at the same retail price in Time Warner cable areas as in other areas, and to hold separate Road Runner, a cable ISP, from AOL's ISP service until AOL Time Warner offers an unaffiliated ISP on all AOL Time Warner cable systems.[15]

[14] *See, e.g.*, 47 U.S.C. §§ 533(f), 548; 47 C.F.R. §§ 76.503, 76.504, 76.1000-76.1004; *AT&T-MediaOne Order*, 15 FCC Rcd at 9835 ¶ 38.

[15] *In the Matter of America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) ("FTC Consent Agreement").

18. After reviewing the comments filed in this proceeding,[16] we find that, subject to certain conditions designed to mitigate merger-specific harms, and in light of the terms of the FTC Consent Agreement, the public interest benefits of the proposed merger outweigh the public interest harms. Among many issues raised by commenters, we focus particularly on four potential harms. First, we find that the proposed merger would give AOL Time Warner the ability and incentive to harm consumers in the residential high-speed Internet access services market by blocking unaffiliated ISPs' access to Time Warner cable facilities and by otherwise discriminating against unaffiliated ISPs in the rates, terms and conditions of access. To remedy this harm, this *Order* conditions approval of the merger on certain conditions relating to AOL Time Warner's contracts and negotiations with unaffiliated ISPs. Second, we find that the merger would make it more likely that AOL Time Warner would be able to solidify its dominance in the high-speed access market by obtaining preferential carriage rights for AOL on the facilities of other cable operators. We particularly find that the merger would harm the public interest by allowing for greater coordinated action between AOL Time Warner and AT&T in the provision of residential high-speed Internet access services. To remedy these harms, we impose a condition forbidding the merged firm from entering into contracts with AT&T that would give AOL exclusive carriage or preferential terms, conditions and prices. Third, we find that the proposed merger would enable AOL Time Warner to dominate the next generation of advanced IM-based applications. To remedy this harm, we impose a condition requiring AOL Time Warner, before it may offer an advanced IM-based application that includes streaming video, to provide interoperability between its NPD-based applications and those of other providers, or to show by clear and convincing evidence that circumstances have changed such that the public interest will no longer be served by an interoperability condition. Fourth, although we have concerns that the merger may give AOL Time Warner the ability and the incentive to discriminate against the interactive television ("ITV") services of unaffiliated video programming networks, we find that the terms of the FTC Consent Agreement will adequately protect the public interest by prohibiting certain types of discrimination and that it is not necessary for us to impose further conditions in this proceeding; however, we have initiated a Notice of Inquiry ("*ITV NOI*") to explore ITV issues in the market generally.[17] Subject to the conditions described above, we find that the proposed merger will serve the public interest.

II. PUBLIC INTEREST FRAMEWORK

19. Sections 214(a) and 310(d) of the Communications Act require the Commission to determine whether the Applicants have demonstrated that the public interest would be served by transferring control of AOL's and Time Warner's Commission license authorizations to AOL Time Warner.[18] Our statutory mandate, confirmed by our precedent, requires that we weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have demonstrated that, on balance, the merger serves the public interest and convenience.[19] The Applicants bear the burden of proving that the transfer will advance the public interest.[20]

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[16] *See* Appendix A for a list of commenters in this proceeding.

[17] *See Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, Notice of Inquiry ("*ITV NOI*"), FCC 01-15 (rel. Jan. 19, 2001).

[18] 47 U.S.C. §§ 214(a), 303(r), 310(d). *See WorldCom-MCI Order*, 13 FCC Rcd at 18030 ¶ 8 (1998); *Bell Atlantic-NYNEX* Order, 12 FCC Rcd at 20000 ¶ 29.

[19] *SBC-Ameritech Order*, 14 FCC Rcd at 14736 ¶ 46; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 10.

[20] *AT&T-TCI Order*, 14 FCC Rcd at 3169-70 ¶ 15 (1999); *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 10 n.33 (citing 47 U.S.C. §309(e) (burdens of proceeding and proof rest with the applicant.)).

20. In conducting its public interest inquiry, the Commission examines four overriding questions: (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision;[21] (2) whether the transaction would result in a violation of the Commission's rules;[22] (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act and/or other related statutes, or would interfere with the objectives of the Communications Act and/or other related statutes;[23] and (4) whether the transaction promises to yield affirmative public interest benefits.[24]

21. The Commission's analysis of public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles.[25] While an antitrust analysis, such as that undertaken by the Department of Justice or, in this case, the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition,"[26] the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition.[27] To find that a merger is in the public interest, therefore, the Commission must "be convinced that it will enhance competition."[28]

22. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act."[29] These broad aims include, among other things, ensuring the existence of a nationwide communications service, available to everyone; implementation of Congress's pro-competitive, deregulatory national policy framework designed to open all telecommunications markets to competition; the preservation and advancement of universal service; and the acceleration of private sector

[21] *AT&T-MediaOne Order*, 15 FCC Rcd at 9820-21 ¶ 9; *SBC-Ameritech Order*, 14 FCC Rcd at 14737 ¶ 48.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. *See FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure.") *See also WorldCom-MCI Order*, 13 FCC Rcd at 18034 ¶ 13 (*citing RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81082 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc., v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.).

[26] 15 U.S.C. § 18.

[27] *See WorldCom-MCI Order*, 13 FCC Rcd at 18032-33 ¶¶ 12-13; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19987 ¶ 2.

[28] *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19987 ¶ 2.

[29] *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

deployment of advanced services.[30] Our public interest analysis may also entail assessing whether the merger will affect the quality of telecommunications services or will result in the provision of new or additional services to consumers.[31] Thus, apart from traditional antitrust concerns, we are required to consider, among other things, whether the proposed merger will further the statutory goals of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,"[32] and "promot[ing] competition in the delivery of diverse sources of video programming . . ."[33]

23. The Supreme Court has found that decentralization of information production serves values that are central to the First Amendment. Indeed, the Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[34] Accordingly, the Court had "no difficulty" in concluding that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."[35]

24. Following passage of the 1996 Act, local telecommunications markets have been undergoing a transition to competitive markets. Therefore, a transaction may have predictable yet dramatic consequences for competition over time even if the immediate effect is more modest.[36] When a transaction is likely to affect local communications markets, our statutory obligation requires us to assess future as well as current market conditions. In doing so, the Commission may rely on its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.[37]

25. Where necessary, the Commission can attach conditions to a transfer of licenses and authorizations in order to ensure that the public interest is served by the transaction.[38] Section 214(c) of

[30] *WorldCom-MCI Order*, 13 FCC Rcd at 1830-31¶ 9.

[31] *See, e.g., id.*

[32] 47 U.S.C. § 521(4).

[33] 47 U.S.C. § 523(a).

[34] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[35] *Turner Broadcasting*, 512 U.S. at 663. *See also Review of the Commission's Regulations Governing Television Broadcasting: Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, 12910-12916 (1999). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself of a private licensee."); *Turner Broadcasting*, 512 U.S. at 657 ("[T]he potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

[36] *WorldCom-MCI Order*, 15 FCC Rcd at 9822 ¶ 12; *SBC-Ameritech Order*, 14 FCC Rcd at 3170 ¶ 51.

[37] *Id.*

[38] *See* 47 C.F.R. § 1.10; *WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10.

the Communications Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience may require."[39] Similarly, section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[40] Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to impose and enforce certain types of conditions that result in a merger yielding overall positive public interest benefits.[41]

26. Where a license transfer applications shows that the merger would yield affirmative public interest benefits and would not violate the Communications Act or Commission rules, nor frustrate or undermine policies and enforcement of the Communications Act, there is no need for extensive review and expenditure of considerable resources by the Commission and interested parties.[42] This is not the case with regard to this proposed transaction. We analyze the potential public interest harms and benefits of this proposed merger, absent conditions, in the next sections.

III. BACKGROUND

A. The Applicants

27. *AOL.* AOL is divided into four operating groups, the Interactive Services Group, the Interactive Properties Group, the AOL International Group, and the Enterprise Solutions Group.[43] These groups provide interactive service, Web brands, Internet technologies and electronic commerce ('e-commerce') services.[44] For the twelve months ending June 30, 2000, AOL earned $6.9 billion in revenues. Subscription services accounted for $4.4 billion, advertising, commerce and other related services accounted for just under $2 billion, and "Enterprise Solutions" accounted for the remaining $500 million in revenues. AOL's net income for this period totaled $1.2 billion. For the first quarter of its fiscal year 2001, AOL reported $2.0 billion in revenue.[45]

28. *Interactive Services.* The Interactive Services Group operates branded interactive services such as AOL's flagship ISP AOL Internet service. This fee-based service provides Internet access and

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[39] 47 U.S.C. § 214(c). *See WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20002 ¶ 30 n.59 (*citing Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995).

[40] 47 U.S.C. § 303(5). *See WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 n.36 (*citing FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

[41] *See WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14.

[42] *AT&T-TCI Order*, 14 FCC Rcd at 3170 ¶ 16.

[43] *See* Supplemental Information to Applications filed by AOL and Time Warner on Mar. 21, 2000 ("Applicants' March 21 Supplemental Information") at 8; *see also* America Online, Inc., *Form 10-Q For the Quarterly Period Ended Mar. 31, 2000*, at 4.

[44] Application at 2.

[45] America Online, Inc., *America Online Reports Record-Breaking Results For FY2001 First Quarter In Net Income, Total Revenues, Ad/Commerce And Membership* (press release), Oct. 18, 2000.

specialized content to more than 26 million subscribers.[46] AOL's ISP content includes news, entertainment, health, travel, sports, and finance information organized into "channels" from which subscribers can choose.[47] Included among AOL's numerous corporate partners that provide it with content and advertising are American Airlines, Budget Rent-a-Car, Sesame Street, Toys-R-Us, Barnes and Noble, Amazon.com, Godiva Chocolatier, JC Penney, Wal-Mart, Coca Cola, Proctor and Gamble, Avon, and CBS News.[48] A non-exhaustive list of additional features that the AOL service affords members includes e-mail, public bulletin boards, and the "Buddy List" feature (allowing members to discern whether fellow members are online simultaneously).[49] The AOL ISP service also includes AOL Plus, AOL's broadband Internet access service and enhanced content. AOL also offers the CompuServe ISP service, which has 2.8 million subscribers worldwide.[50]

29. An additional feature offered by AOL to its subscribers is IM.[51] In its simplest form, IM enables the almost instantaneous exchange of short text messages over the Internet between a person ("the sender") and another person ("the recipient") chosen by the sender. AOL also offers IM software, known as AOL Instant Messenger ("AIM") to non-AOL subscribers free of charge.[52] AOL has AIM co-branding arrangements with numerous companies, including Apple, BellSouth Mobility, DigitalWork.com, EarthLink Communications, Juno, IBM, Lycos, Motorola, Net2Phone, Nokia, Oxygen Media, RealNetworks, and TV Guide.[53] AOL also owns another IM service, ICQ.[54] AOL is, by far, the largest provider of IM.[55]

30. The Interactive Services Group also oversees AOLTV, an advanced interactive television service. AOLTV enables subscribers to access AOL features, such as chat rooms, e-mail, and IM through an interface overlaid on their television screens.[56] In addition, AOLTV offers interactive content and information tailored to the specific video programming being viewed.[57] Selected retailers started selling AOLTV set-top boxes in June 2000.[58] The boxes retail for $200-300. In addition, consumers must pay a

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[46] America Online, Inc., *AOL Membership Surpasses 26 Million Milestone* (press release), Dec. 12, 2000.

[47] Applicants' March 21 Supplemental Information at 4.

[48] *See* America Online, Inc., *Who We Are*, at http://corp.aol.com/whoweare/partners.html (visited Nov. 28, 2000).

[49] America Online, Inc., *Form 10-K for Year Ended June 30, 1999*, at 3 ("AOL 1999 10-K").

[50] America Online, Inc., *AOL Gears Up For Holiday Shopping Blitz With Best Partners, Most Convenient Tools, And Industry's Leading E-Commerce Performance* (press release), Nov. 15, 2000.

[51] AOL 1999 10-K, at 3.

[52] The Interactive Services Group also houses AOL's Netscape Netcenter Web portal, and the AOL.com Web Portal, both of which are available to non-AOL members. *Id.*

[53] America Online, Inc., *America Online And Satyam Infoway Enter Into Agreement To Offer Co-Branded Version Of AOL Instant Messenger Service* (press release), July 12, 2000.

[54] AOL obtained ICQ when it bought Mirabilis for $287 million in June, 1998. *See* Bernhard Warner, *I Seek Revenue ? Chat App Goes Portal*, THE STANDARD, Feb. 22, 1999, at http://www.industrystandard.net/article/display/0%2C1151%2C3586%2C00.html (visited Aug. 24, 2000).

[55] *See* Section IV.B, *infra*. (Instant Messaging and Advanced IM-Based High-Speed Services)

[56] Applicants' March 21 Supplemental Information at 5.

[57] *Id.*

[58] America Online, Inc., *America Online Launches AOL-TV – The First Interactive Television Service for the Mass Market* (press release), June 19, 2000.

monthly subscription fee to receive the service.[59] AOLTV services can also be purchased directly from AOLTV's website.[60] AOL has plans to develop an AOLTV integrated cable set-top box,[61] as well as an integrated DirecTV set-top box.[62]

31. *Interactive Properties Group.* The Interactive Properties Group includes Digital City, MovieFone, Spinner, WINamp, and ICQ. Digital City provides Internet local content and community guides that include news, sports, weather and entertainment information, as well as an interactive forum.[63] Digital City provides this information for 200 markets.[64] According to AOL, Digital City averages 40 million page views a week, and has 2,000 interactive marketing partners.[65] AOL MovieFone is a movie guide and ticketing service customers can access either through a toll-free number or the MovieFone.com web site. Prior to the merger, AOL MovieFone had entered into advertising agreements with Time Warner film companies, Warner Bros. and New Line Cinema.[66] Spinner is a web site that allows users to listen to music organized into channels, and to purchase the music directly through the web site.[67] WINamp is a branded MP3 player that allows users to listen to and download music.[68] The WINamp web site also hosts numerous Internet radio stations.[69]

32. *AOL International Group.* The AOL International Group oversees the AOL and CompuServe services outside the United States.[70] AOL and CompuServe offer their branded services through joint ventures or distribution arrangements in Australia, Austria, Canada, France, Germany, Japan, the Netherlands, Sweden, Switzerland, and the United Kingdom.[71] America Online Latin America, Inc. is a leading Latin American Internet and interactive service provider.[72] AOL owns approximately 80% of America Online Latin America.[73]

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[59] AOL Members pay $14.95 per month for service, while non-members must pay $24.95 monthly. *See* America Online, Inc., at http://www.aoltv.com (visited Nov. 28, 2000).

[60] *See* America Online, Inc., at http://store.aolshopdirect.com (visited Nov. 28, 2000).

[61] Reshma Kapadia, *AOLTV To Take to the Air Monday*, ZDNET, June 16, 2000, at http://www.zdnet.com/zdnn/stories/news/0,4586,2589185,00.html (visited Aug. 21, 2000).

[62] America Online, Inc., *America Online, Inc., Announces Key AOL TV Partnerships* (press release), May 11, 1999.

[63] AOL 1999 10-K at 4.

[64] America Online, Inc., *AOL's Digital City Personalized E-Letter Hits 1 Million Mark* (press release), Sept. 6, 2000.

[65] America Online, Inc., *AOL Digital City Kicks Off Major Expansion to Widen Lead in Fast-Growing Local Online Market* (press release), Mar. 21, 2000.

[66] AOL Time Warner Inc., *Form S-4 Registration Statement* (filed Feb. 11, 2000) at 125.

[67] AOL 1999 10-K at 4.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] America Online, Inc., *AOL Latin America Information: Frequently Asked Questions*, at http://corp.aol.com/ir/aol&latin-faq.html? (visited Aug. 24, 2000).

[73] *Id.*

33. *Enterprise Solutions Business Products and Services.* The Netscape Enterprise Group is the primary product group in AOL's Enterprise Solutions division.[74] The Netscape Enterprise Group develops, markets, sells and supports a broad suite of enterprise software that consists of electronic commerce infrastructure and electronic commerce applications targeted primarily at corporate intranets and extranets, as well as the Internet.[75] In November 1998, AOL entered into a strategic electronic commerce alliance with Sun MicroSystems, which is now referred to as the Sun-Netscape Alliance. The alliance builds and markets on a collaborative basis end-to-end electronic commerce solutions to help business partners and other companies put their businesses online.[76]

34. *Ownership Interest in General Motors Corporation-Hughes Electronics Corporation.* In 1999, AOL invested $1.5 billion in General Motors Corporation ("GM"), the parent company of Hughes Electronics Corporation ("Hughes"), to "accelerate the development of" Direct Broadcast Satellite ("DBS") "as a platform for the next generation of Internet services."[77] This investment is in the form of GM's "Series H 6.25% Automatically Convertible Preference Stock."[78] Hughes is the parent company of DirecTV, the country's largest DBS provider, and DirectPC, a high-speed satellite ISP.[79]

35. *Telephony.* AOL has ownership stakes in two companies that offer telephony services, Talk.Com, Inc. and Net2Phone, Inc.[80] AOL owns 6.26% of Talk.com.[81] Talk.com offers local telecommunications services, including outbound long-distance service, local service, inbound toll-free service, and dedicated data line services.[82] Among its calling plans is AOL Long Distance, a plan offered exclusively to AOL members.[83] AOL also owns 4.63% of Net2Phone's capital stock.[84] AOL's ownership of this stock gives it 5.14% of the total voting power of the company.[85] Net2Phone provides

[74] AOL 1999 10-K at 5.

[75] AOL 1999 10-K at 5.

[76] *Id.*

[77] Applicants' March 21 Supplemental Information at 11.

[78] Applicants' March 21 Supplemental Information at 12. *See General Motors Corporation, SEC Form 8-K* (filed Aug. 23, 1999) at Appendix D at Section 3(j).

[79] DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes.

[80] *Response to June 9, 2000, Request for Further Information In the Matter of Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control, CS Docket No. 00-30*, Attachment (June 26, 2000) ("Applicants' First Response") at 27, transmitted by letter from Peter Ross, Esq., Wiley, Rein and Fielding, Counsel for AOL, and Arthur Harding, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner, to Royce Dickens, Deputy Chief, Policy and Rules Division, FCC Cable Services Bureau, dated June 26, 2000.

[81] *Id.*

[82] *Id.*

[83] Talk.Com, Inc., at http://www.talk.com/ (visited Aug. 23, 2000).

[84] Applicants' First Response at 30.

[85] Applicants' First Response at 31. As of August 11, 2000, AT&T had a 32% economic interest in Net2Phone, and a 39% voting stake in the company. *See* Net2Phone, Inc., *AT&T Completes Net2Phone Investment* (press release), Aug. 11, 2000.

Internet telephony, a service that allows users to make low-cost telephone calls over the Internet.[86] It also provides technology to integrate live voice capabilities into the Web.[87]

36. *Time Warner*. Time Warner is a worldwide media and entertainment company. It creates and distributes branded content through the business interests described in detail in this section. Time Warner reported overall 1999 revenues of $27.3 billion, and operating income of $7.3 billion.[88]

37. *Cable Systems and MVPD Services*. Time Warner, the second largest cable provider in the country, serves 12.7 million subscribers through cable systems that pass approximately 21 million homes.[89] Time Warner cable systems serve approximately 18.9 % of the 67 million cable subscribers nationwide and 15.4% of the 82 million subscribers to multichannel video programming distribution ("MVPD") systems nationwide.[90]

38. Time Warner's cable systems are held through three entities managed by Time Warner Cable: Time Warner Entertainment ("TWE"), Time Warner Entertainment – Advance/Newhouse Partnership ("TWE-A/N"), and TWI Cable, Inc. ("TWI Cable").[91] TWE is a limited partnership; Time Warner owns 74.5% of TWE. The remaining 25.5% is owned by AT&T as a result of its purchase of MediaOne Group, Inc.[92] TWE serves approximately 4.2 million basic cable subscribers.[93] TWI Cable, which serves approximately 1.8 million subscribers, is an indirect wholly-owned subsidiary of Time Warner.[94] TWE-A/N is a general partnership owned by TWE, TWI Cable, and Advance/Newhouse Partnership.[95] TWE-

[86] Applicants' First Response at 30.

[87] *Id.*

[88] *See* Time Warner Inc., *Time Warner Businesses Report Record 1999 and Fourth Quarter Results* (press release), Feb. 2, 2000.

[89] Applicants' March 21 Supplemental Information at 8.

[90] MVPDs include cable, DBS, multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, Sixth Annual Report ("*1999 Competition Report*"), 15 FCC Rcd 978, 980 ¶ 3 (generally describing the various types of MVPDs). MMDS providers offer programming via microwave facilities (the service is often referred to as "wireless cable service"). SMATV operators, also known as "private cable operators," also frequently use microwave facilities to transmit programming to subscribers without crossing rights-of-way. SMATV subscribers usually reside in multiple dwelling units ("MDUs"). *1999 Competition Report*, 15 FCC Rcd at 1090 Tbl. C-1.

[91] Applicants' March 21 Supplemental Information at 28.

[92] Paul Kagan Assoc., Inc., *10-Year Cable TV Industry Projections*, Cable TV Investor, June 19, 2000, at 15; *see also AT&T-MediaOne Order*, 15 FCC Rcd at 9816 ¶ 4. As a non-severable condition of the Commission's grant of AT&T's acquisition of MediaOne, AT&T must either a) divest its interest in TWE; b) terminate its involvement in TWE's video programming activities; or c) divest its interests in other cable systems, such that it will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide by May 19, 2001. *Id.* On December 15, 2000, AT&T notified the Commission of its intention to divest either its programming assets or its interest in TWE. For a further discussion of AT&T's compliance election, *see* Section IV.F., *infra*, (Coordination with AT&T).

[93] *Id.* at 8.

[94] Applicants' March 21 Supplemental Information at 9.

[95] *Id.* at 9.

A/N serves approximately 6.7 cable million subscribers.[96] Time Warner's partnership interest in TWE-A/N, held through TWE and TWI Cable, totals approximately 67%.[97]

39. *Internet Services*. Time Warner controls Road Runner, a joint venture that provides high-speed Internet access and content optimized for broadband networks to more than 1.1 million subscribers,[98] of whom more than 719,000 are served by Timer Warner Cable systems.[99] Road Runner is available in cable systems passing more than 19.5 million homes.[100] As of December 31, 1999, after conversion of all preferred interests, Road Runner was owned 8.6% by TWI Cable, 20% by TWE, 26.3% by TWE-A/N, 25.1% by AT&T, and 10% each by Microsoft and Compaq.[101] Pursuant to a consent decree with the United States Department of Justice ("DOJ"), entered into as a condition of the AT&T-MediaOne merger,[102] AT&T must divest its direct interest in Road Runner no later than December 31, 2001. Time Warner and AT&T recently announced a restructuring of Road Runner that is the first step in AT&T's divestiture of its interest in Road Runner in compliance with the DOJ Consent Decree. The restructuring is anticipated to be completed by April 2001.[103]

40. *Video Programming Networks*. Time Warner holds interests in numerous national, international and regional programming networks.[104] These interests are divided into three entities: TBS Entertainment, CNN News Group, and Home Box Office ("HBO"). TBS Entertainment and CNN News Group are each indirectly wholly owned by Time Warner. CNN News Group includes CNN, CNN Headline News, CNN/SI, and CNNfn.[105] CNN, a 24-hour per day cable television news service, is available to more than 77 million U.S. MVPD subscribers.[106] In 1999, CNN had nine of the ten highest-rated regularly scheduled basic cable news programs.[107] TBS Entertainment includes TBS, TNT, Turner Classic Movies, Cartoon Network and Turner South.[108] Three of TBS Entertainment's stations were among the five top-rated basic cable networks in 1999.[109] TBS and TNT each are available to over 75

[96] *Id.* at 8.

[97] *Id.* at 9.

[98] Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[99] Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://CableDatacomNews.com/cmic/cmic16.html (visited Dec. 28, 2000).

[100] Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[101] Time Warner Inc., *Filing 10-K for the Year Ended Dec. 31, 1999* (Mar. 30, 1999) ("Time Warner 1999 10-K") at I-19. AT&T acquired its 25.1% interest in Road Runner when it merged with MediaOne. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9819-20 ¶ 5.

[102] *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000) ("DOJ Consent Decree"). The DOJ Consent Decree does not affect AT&T's indirect interest in Road Runner through its ownership in TWE.

[103] AT&T Corp., *Road Runner Joint Venture To Be Dissolved* (press release), Dec. 18, 2000. *See also* Time Warner Inc., *Time Warner To Increase Road Runner Ownership and Manage Its Operations* (press release), Dec. 18, 2000.

[104] Application at 4.

[105] Applicants' March 21 Supplemental Information at 9.

[106] Time Warner 1999 10-K at I-4.

[107] Time Warner Inc., *Cable Networks*, at http://www.timewarner.com/about/cablenets (visited Aug. 18, 2000).

[108] *Id.*

[109] *See* Time Warner Inc., *Cable Networks*, at http://www.timewarner.com/about/cablenets/turnerent/index.html

(continued...)

million subscribers.[110] Additionally, through wholly owned subsidiaries of TBS, Time Warner owns three Atlanta-based sports franchises: the Atlanta Braves of Major League Baseball, the Atlanta Hawks of the National Basketball Association, and the Atlanta Thrashers of the National Hockey League.[111] HBO is wholly owned by TWE.[112] HBO offers premium programming channels such as Home Box Office and Cinemax. These channels had almost 36 million subscribers in 1999.[113] In addition, Time Warner Cable operates 24-hour local news channels in New York City; Tampa Bay; Orlando; Rochester, New York; and Austin, Texas.[114]

41. *Publishing Interests*. Time Warner's publishing division includes magazines, book publishing, book-of-the-month clubs, and interactive media sites. Time, Inc. publishes 36 magazines that reach approximately 200 million readers.[115] These magazines include *Time*, *People*, *Sports Illustrated*, *Money*, and *Fortune*.[116] Each of these magazines also has an affiliated website.[117] In 1999, Time Warner magazines accounted for 22.6% of total advertising revenue in consumer magazines, as measured by the Publishers Information Bureau.[118]

42. *Music*. Time Warner's music division, Warner Music Group ("WMG"), consists of interests in recorded music and music publishing.[119] WMG includes record labels such as Atlantic, Elektra, Rhino, Sire, Warner Bros. Records, and Warner Music International.[120] The Applicants have worked together to cross-promote WMG properties. A WMG subsidiary and AOL's Spinner.com, an Internet streaming music service, cross-promoted a recording earlier this year, and cross-promoted musicians on one of Spinner.com's channels.[121] Maverick Recording Co., another WMG record label, and AOL have

(...continued from previous page)
(visited Aug. 18, 2000).

[110] Time Warner 1999 10-K at I-3.

[111] Time Warner 1999 10-K at I-6.

[112] Applicants' March 21 Supplemental Information at 9.

[113] *See* Time Warner Inc., *Cable Networks*, at http://www.timewarner.com/about/cablenets/hbo/index.html (visited Aug. 18, 2000). HBO also owns a 50% interest in Comedy Central, a basic cable television service, available in 62 million homes. and, through TWE, Time Warner also has a 50% interest in Court TV, which is available in approximately 37.5 million homes.[113]

[114] Time Warner 1999 10-K at I-20.

[115] *Id.*

[116] *See* Time Warner Inc., *Publishing: Time, Inc.*, at http://www.timewarner.com/corp/about/publishing/timeinc/compbrandprod.html (visited Aug. 18, 2000).

[117] *See* Time Warner Inc., *Public Archive*, at http://www.timewarner.com/corp/about/pubarchive/websites.html#publishing (visited Aug. 21, 2000).

[118] Time Warner 1999 10-K at I-7.

[119] Applicants' March 21 Supplemental Information at 8.

[120] *Id.*

[121] America Online, Inc., *Warner Bros. Records and AOL's Spinner.com Present Faith Hill Live Online!* (press release), Mar. 2, 2000.

partnered to provide music and premiere recordings on AOL's Entertainment Channel and Spinner.com.[122]

43. *Filmed Entertainment*. Time Warner's filmed entertainment businesses primarily consist of the production and distribution of films and television programming.[123] Its component companies include Warner Bros. Pictures, New Line Cinema, Castle Rock, Warner Home Video, and Telepictures Productions. During 1999, Warner Bros. Pictures released 25 motion pictures for theatrical distribution.[124] Through its other film lines, Time Warner released more than 20 additional films in 1999.[125] Time Warner's television programming interests include ownership of a library containing 5,700 feature films, 32,000 television titles, 12,000 animated titles, and 1,500 animated shorts.[126] Warner Bros. Television ("WBTV") produces various primetime dramatic and comedy programming for major networks.[127]

44. *The WB Television Network*. Time Warner is the majority owner of The WB Television Network ("The WB").[128] The WB is a broadcast network that reaches 83% of all U.S. households.[129] The WB broadcasts 13 hours of series programming per week; its children's network, Kids' WB!, airs 19 hours of programming per week.[130]

45. *Telephony*. Time Warner provides both residential and business telephony services. Time Warner residential telephony service is offered by Time Warner Cable ("TWC"). TWC has offered circuit-switched service in Rochester, New York since 1994. TWC also provides residential telephony service in Portland, Maine to a limited number of its cable customers in that market.[131] In February 1999, eleven months prior to the announcement of the intended AOL and Time Warner merger, Time Warner and AT&T signed a preliminary letter of intent for a cable telephony joint venture. While the joint venture has not yet been launched, Time Warner and AT&T continue to have ongoing discussions regarding the provision of residential telephony to Time Warner's cable subscribers.[132] Time Warner and AT&T have also signed joint marketing agreements to provide incentives to individuals in Albany and Syracuse, New York to subscribe to both Time Warner cable service and AT&T long distance service.[133]

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[122] America Online, Inc., *Alanis Morissette Sets Precedent With Worldwide Debut of New Video Exclusively Online* (press release), June 25, 1999; America Online, Inc., *AOL, Inc.'s Spinner.com Announces World Premiere of Maverick Records' Meshell Ndegocello's Latest Single* (press release), Aug. 11, 1999.

[123] Applicants' March 21 Supplemental Information at 8.

[124] Time Warner 1999 10-K at I-13.

[125] *Id.* at I-13.

[126] *Id.* at I-13.

[127] *Id.* at I-14.

[128] *Id.* at I-16. Tribune Broadcasting holds a 22.25% interest in The WB, and key employees of The WB hold an 11% interest in the network.

[129] *Id.* at I-15.

[130] *Id.* at I-15-16.

[131] Applicants' First Response at 22.

[132] *Id.*

[133] *Id.* at 14. *See also* Time Warner Inc., *AT&T and Time Warner Cable Announce Joint Marketing Agreement* (press release), Mar. 8, 2000.

According to Time Warner, "AT&T and Time Warner Cable will offer other long distance and cable television incentives and will engage in [additional] joint telemarketing efforts."[134] Finally, Time Warner, through its subsidiary Time Warner Connect, has received certification as a competitive local exchange carrier ("LEC"), allowing it to offer residential telephony in California, Florida, Ohio and Texas.[135]

46. Time Warner serves businesses through Time Warner Telecom, Inc. ("TWT"), a facilities-based communications provider serving large businesses.[136] TWT offers businesses "last mile" broadband connections for data, high-speed Internet, local voice and long-distance services.[137] TWT is certified to offer telecommunications services in 21 metropolitan areas in 12 states.[138] As of December 31, 1999, TWT's network included almost 8,900 route miles, 333,00 fiber miles and offered service to 5,566 buildings.[139] During 1999, TWT's investment in its communications networks exceeded $556 million.[140] TWT anticipated that it would commit approximately $350 million in 2000 to fund its capital expenditures for current operating areas its expansion plans.[141]

B. Other Proceedings Relevant to the Application to Transfer Licenses.

47. *Federal Trade Commission Review*. In addition to Commission review, the proposed merger is subject to review by the FTC. The FTC recently approved the merger, subject to certain conditions.[142] The FTC Consent Agreement requires, among other provisions discussed below: (1) that AOL Time Warner make available to subscribers at least one unaffiliated ISP on Time Warner's cable systems before AOL itself begins offering service; that AOL Time Warner allow two other unaffiliated ISPs onto its cable systems within 90 days after AOL's commencement of service; and that AOL Time Warner negotiate in good faith for non-discriminatory access to its cable systems with any ISPs requesting such access; (2) that AOL Time Warner not interfere with content passed along the bandwidth contracted for by unaffiliated ISPs, or discriminate on the basis of affiliation in the transmission of content that AOL Time Warner has contracted to deliver to subscribers over their cable systems; and (3) that AOL Time Warner market and offer AOL's DSL services in the same manner and at the same retail price in Time Warner cable areas where affiliated cable-based Internet access service *is* available, as in those areas where affiliated cable-based Internet access service is *not* available.[143] The FTC also required, in a separate order, that AOL Time Warner hold separate Road Runner and AOL until such time that it offers over all of its cable properties an unaffiliated ISP.[144]

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[134] *Id.*

[135] *Id.*

[136] Applicants' First Response at 23. Time Warner owns 47.85% of the equity in TWT, and 66.86% of TWT's voting power. *See id.* at 23, 26.

[137] Applicants' First Response at 23.

[138] *Id.* at 26.

[139] *Id.* at 24.

[140] *Id.* at 24.

[141] *Id.*

[142] *See* FTC Consent Agreement and Federal Trade Commission Office of Public Affairs, *FTC Approves AOL/Time Warner Merger with Conditions* (press release), Dec. 14, 2000 (describing FTC action). (FTC Press Release)

[143] *Id.* at 2.

[144] Federal Trade Commission, *Order To Hold Separate in the Matter of America Online, Inc., and Time Warner* (continued...)

48. *European Commission Review*. On October 11, 2000, the European Commission (the "EC") granted conditional approval to the Applicants' proposed merger.[145] The EC's approval was conditioned upon AOL's agreement to sever all structural links between itself and the German multi-media company Bertelsmann AG.[146] The EC did not address concerns with respect to the European market for residential high-speed Internet access, stating that the Applicants do not have a "broadband infrastructure in Europe."[147]

49. *Local Franchising Authority Review*. As of September 14, 2000, Applicants had completed initial regulatory filings with approximately 1,150 local franchising authorities.[148] Pursuant to Section 617 of the Communications Act, local franchising authorities with jurisdiction to review transfers or sales of cable systems have 120 days from the date of Applicants' request for a franchise transfer to render a decision.[149] As of September 14, the Applicants had received approval from, or did not need to receive approval from, communities covering approximately 99.63% of total subscribers served by Time Warner Cable.[150] Three communities denied the request to transfer.[151] Subsequently, one of these communities reconsidered and granted approval.[152]

C. The Merger Transaction and the Application to Transfer Licenses

50. *Proposed Transaction*. On January 10, 2000, AOL and Time Warner agreed to merge in a stock-for-stock transaction whereby each will become a wholly owned subsidiary of AOL Time Warner.[153] Under the merger agreement, Time Warner and AOL stock will be converted into AOL Time Warner stock at fixed exchange ratios: Time Warner shareholders will receive 45% of the new corporation, and AOL shareholders will receive 55%, each on a fully diluted basis.[154] Upon the merger's completion, ownership and control of all entities holding FCC licenses are to be transferred from Time Warner and AOL individually to the newly formed AOL Time Warner.[155] Currently, Time Warner holds

(...continued from previous page)
Inc., Docket No. C-3989, rel. Dec. 14, 2000.

[145] European Commission, *Commission Gives Conditional Approval to AOL/Time Warner Merger* (press release), Oct. 11, 2000.

[146] *Id.*

[147] *Id.*

[148] Letter from Arthur Harding, Wiley, Rein and Fielding, Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Sept. 14, 2000 ("Harding Sept. 14 Letter").

[149] 47 U.S.C. § 537; 47 C.F.R. § 76.502.

[150] Harding Sept. 14 Letter.

[151] *Id.*

[152] Letter from Arthur Harding, Wiley, Rein and Fielding, Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Dec. 5, 2000 ("Harding Dec. 5 Letter"). Cary, North Carolina and Biddeford, Maine are the communities that denied the transfer. *Id.* In addition, one community that had not granted approval as of Sept. 14, 2000 subsequently granted its consent. *Id.*

[153] Time Warner Inc., *America Online and Time Warner Will Merge* (press release), Jan. 10, 2000; *see also* Application at 4-5.

[154] Application at 5.

[155] Application at 4-5. *See* Application at Attachment 1, for a full listing of licenses held by AOL and Time Warner.

numerous Commission licenses associated with its cable television systems, broadcast stations, and telephony ventures.[156]

51. The merger would join the nation's largest ISP, AOL, with the nation's second largest cable operator, Time Warner. The Applicants believe that the combined company will spur the development of residential broadband service, and bring next-generation multimedia content and powerful e-commerce applications to consumers.[157] The Applicants also contend that their combination will create new opportunities for interactive entertainment, news, online services, music, publishing, and film distribution.[158] The Applicants aver that their merger will lead to a solution to the "cable access" issue, and to the provision of multiple ISPs over the cable platform.[159] In particular, AOL and Time Warner point to their Memorandum of Understanding Regarding Open Access Business Platforms (the "MOU"), into which the Applicants entered shortly after agreeing to merge, as a "turning point" in the effort to promote a "vigorously competitive marketplace for broadband Internet services."[160]

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

52. Parties opposing the merger have alleged that the combination of AOL and Time Warner will harm the public interest with respect to the provision of various services. We address below the effects of the merger on only those services that may be affected adversely by the merger, based on commenters' allegations and our own analysis. Specifically, we examine the merger's potential effects on (1) high-speed Internet access services, (2) services based on instant messaging, (3) interactive television services, (4) electronic programming guides, (5) carriage of television broadcast signals, (6) increased concentration among MVPDs, and (7) competition among MVPDs. In addition, we examine the merger's potential public interest harms in light of AOL Time Warner's ownership and contractual relationships with AT&T Corp.[161]

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[156] Time Warner's cable systems hold more than 150 Cable Television Relay Service (CARS) Licenses. *See* Application at Appendix 1. CARS licenses are used "for the transmission of television and related audio signals . . . and cablecasting from the point of reception to a terminal point from which the signals are distributed to the public by cable." *See* 47 C.F.R. § 78.1. Thus, CARS licenses can be an integral part of a cable system's plant, allowing the cable system to distribute cable programming to its entire service regardless of certain physical obstacles to transmission. Time Warner subsidiaries also hold six licenses under section 214 of the Communications Act. The licenses permit the holders to provide "common carrier services between the United States . . . and a foreign point." *See* 47 C.F.R. § 63.18. AOL holds five land mobile wireless licenses. Application at Attachment 1.

[157] Application at 9.

[158] *Id.* at 11.

[159] *Id.* at 14.

[160] Applicants' March 21 Supplemental Information at 23.

[161] The City of Daytona Beach raises certain concerns about local franchise matters that we do not address because they are not merger-specific. *See* Letter from Richard F. Quigley, Assistant Manager for Support/Technology Services, City of Daytona Beach, to Magalie Roman Salas, Secretary, FCC, dated Aug. 18, 2000 ("Daytona Beach Aug. 18 Ex Parte"), at 7 (advocating a merger condition requiring AOL Time Warner to set aside channel capacity and facilities for public access, educational and government ("PEG") channels).

A. High-Speed Internet Access Services

53. In this section, we examine the effects of the proposed merger on competition in residential high-speed Internet access services.[162] We again confront in the merger context whether to impose some conditions regarding access to the cable platform for unaffiliated ISPs seeking to provide these services. The Applicants have argued that (i) this case is indistinguishable from prior cases such as *AT&T-MediaOne* in which the Commission declined to require AT&T to open its cable networks to unaffiliated ISPs, and (ii) imposing an access condition here is inconsistent with the Commission's pending *Notice of Inquiry* on high-speed Internet access ("*Cable Access NOI*"),[163] which explores the need for rules of general applicability. We disagree.

54. We find that the circumstances presented by these applications are dramatically different from those presented in our former cases, and compel a different result. AOL is by far the largest narrowband ISP and has been the leading advocate and supporter of the "open access" movement. The proposed merger represents a substantial shift in strategy for AOL and a dramatic change in the ISP/cable system landscape. AOL seeks to purchase the second largest cable system in the country and would obtain in the transaction programming assets that could give it even greater bargaining power to negotiate access to other cable systems. After the merger, AOL would have a unique concentration of assets (vast narrowband membership and the product that has created it, access to Time Warner cable systems, and extensive Time Warner content assets) that could well give it sufficient power to bargain its way onto all other platforms (indeed at preferential terms) without any change in government regulation.

55. None of the prior mergers involved a comparable combination of assets or a comparable potential impact on competition among broadband ISPs. Moreover, while the access issue affects the whole industry, as our *Cable Access NOI* indicates, this merger would place AOL Time Warner in a unique position that may justify conditions inapplicable to others.

56. As further elaborated below, we find that, absent mitigating conditions, the proposed merger would undermine competition in the provision of residential high-speed Internet access services. We find in particular that these services constitute a relevant product market distinguishable from residential narrowband Internet access services. We also find that the proposed merger would give AOL Time Warner both the ability and the incentive to discriminate against unaffiliated ISPs and alternative (non-cable) high-speed platforms within Time Warner cable territories, and to obtain exclusive or preferential carriage for its own Internet access services from other cable providers. As a result, the proposed merger would frustrate statutory goals and Commission policies designed to ensure that the American public has access to a diversity of information sources and to widely available advanced services.

57. We conclude, however, that these potential harms will be substantially averted by the terms of the FTC Consent Agreement.[164] The FTC Consent Agreement requires, among other provisions discussed below, (1) that AOL Time Warner make available to subscribers at least one unaffiliated ISP on Time Warner's cable systems before AOL itself begins offering service; that AOL Time Warner allow two other unaffiliated ISPs onto its cable systems within 90 days after AOL's commencement of service; and that AOL Time Warner negotiate in good faith for non-discriminatory access to its cable systems with

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162 We describe these services more fully below.

163 *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry ("*Cable Access Notice of Inquiry*" or "*Cable Access NOI*"), FCC 00-355 (rel. Sept. 28, 2000).

164 *See* FTC Consent Agreement; FTC Press Release.

any ISPs requesting such access; (2) that AOL Time Warner not interfere with content passed along the bandwidth contracted for by unaffiliated ISPs, or discriminate on the basis of affiliation in the transmission of content that AOL Time Warner has contracted to deliver to subscribers over their cable systems; and (3) that AOL Time Warner market and offer AOL's DSL services in the same manner and at the same retail price in Time Warner cable areas where affiliated, cable-based Internet access service *is* available as in those areas where affiliated, cable-based Internet access service is *not* available.[165] Because we conclude that the FTC Consent Agreement will not avert all the potential harms to the public interest that would result from the proposed merger, we impose certain additional conditions to ensure that AOL Time Warner does not disadvantage unaffiliated ISPs on its cable systems through several indirect means not squarely addressed by the FTC Consent Agreement.

58. The decisions we make in this proceeding do not necessarily portend any specific policy determinations in future proceedings, such as the *Cable Access NOI* or the *ITV NOI*,[166] which will be based on the record in those proceedings. If the Commission were to determine in the context of those proceedings that rules of general applicability were warranted, this Order does not determine or prejudge whether the conditions we adopt here should apply industry-wide. The assessment of what types of generally applicable rules, if any, would be appropriate will flow from the record developed in those proceedings. Should those proceedings ultimately result in rules of general applicability or yield any findings on market definition contrary to our finding here, the Commission may revisit the merger conditions imposed in this section, either on its own motion or upon the Applicants' request.

59. Our authority to address the merger's impact on competition for high-speed Internet access services derives from our statutory duty to ensure that the proposed transaction serves the public interest.[167] As discussed in Section II above, we conduct our public interest inquiry by determining, among other things, whether the proposed transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of the Act or of other statutes.[168] Several such objectives are relevant to our analysis here. First, in adopting the 1996 Act, Congress established a clear national policy to "promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."[169] Concurrently, Congress charged the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[170] The principal purpose of such capability is to facilitate the use of advanced services, of which residential high-

[165] FTC Press Release at 2.

[166] *See* Section IV.D, *infra* (Interactive Television Services).

[167] 47 U.S.C. § 214(a), § 310(d); *see also id.* § 303(r).

[168] *AT&T-MediaOne Order*, 15 FCC Rcd at 9820-21 ¶ 9. In conducting our public interest inquiry, we also examine whether the proposed transaction would result in a violation of the Communications Act or any other applicable statutory provision, and whether it would result in a violation of the Commission's rules. *Id.* The record does not indicate that the proposed transaction would result in any such violations with respect to residential high speed Internet access services.

[169] 47 U.S.C. § 230(b)(1)-(2).

[170] *Id.* § 157 nt.; *see also id.* § 1 (FCC was created "so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"). Congress defined "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability." 47 U.S.C. § 157 nt.

speed Internet access services are one kind.[171] Finally, "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[172] This national policy to promote the public's access to a diversity of viewpoints from a multiplicity of sources finds expression in statutory law as well as in previous decisions of this Commission.[173]

60. Our authority to review the impact of the proposed transaction on the public interest goes hand in hand with broad authority to attach conditions to the proposed transfer of lines and licenses to ensure that the transfer actually serves the public interest. Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[174] Similarly, Section 214(c) of the Communications Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[175]

61. We find that, absent mitigating conditions, the proposed transaction would interfere with each of the objectives discussed above. The merger would imperil the continued existence of a vibrant and competitive free market for development of the Internet because AOL Time Warner would have the ability and the incentive to discriminate against unaffiliated ISPs on its own cable platform, and to obtain exclusive carriage for its Internet access services on the networks of other cable providers.[176] These outcomes would also thwart the deployment of advanced telecommunications capability to all Americans by limiting choice in the realm of residential high-speed Internet access services and, potentially, by threatening the survival of ISPs unaffiliated with AOL Time Warner as consumers migrate from

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[171] *See, e.g., Second Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) at ¶ 3 ("*Second 706 Report*") (noting that "[w]ith advanced telecommunications capability consumers can take advantage of advanced services that allow residential and business consumers to create and access content, sophisticated applications, and high-bandwidth services").

[172] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (internal quotation marks omitted).

[173] *See, e.g.*, 47 U.S.C. § 257(b) (noting that one of the "policies and purposes" of the Communications Act is to "favor[ ] diversity of media voices"); *id.* § 521 nt (codifying findings and policy underlying Cable Television Consumer Protection and Competition Act of 1992) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."); *AT&T-MediaOne Order*, 15 FCC Rcd at 9818-20 ¶¶ 3-5 (considering proposed merger's effects on "diversity and competition" in video programming and its effects on "openness and diversity of broadband Internet content"). We note that we are not here determining the proper legal classification of Internet services provided by cable operators. *See Cable Access NOI* (soliciting comments on proper legal classification of such services). Our determination not to address that issue in this proceeding is consistent with our determination not to do so in *AT&T-MediaOne*. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9872 ¶ 126.

[174] 47 U.S.C. § 303(r).

[175] *Id.* § 214(c).

[176] Discrimination by AOL Time Warner against unaffiliated ISPs on the merged company's cable platform could take the form of an outright refusal to carry such ISPs, or it might occur more subtly – for example, by degrading unaffiliated ISPs' quality of service, limiting their features and functionalities, or discriminating against them in terms and conditions of access. AOL Time Warner could also facilitate discrimination against unaffiliated ISPs on the platforms of other cable operators by using its leverage over video programming to obtain (via explicit contract or tacit agreement) exclusive or preferential treatment for AOL Internet access services that would be denied to its competitors.

narrowband to high-speed services.[177] These outcomes would likewise diminish the public's ability to obtain information from diverse sources, as customers of the nation's second largest cable operator (AOL Time Warner) would have little choice but to access the Internet through service providers affiliated with that entity.[178] Furthermore, as we discuss below, discrimination by AOL Time Warner against unaffiliated ISPs in the market for residential high-speed Internet access services would facilitate discrimination by that company in favor of its own broadband content, a result that could constrain consumers' access to the "widest possible" array of information over high-speed technology.[179] If, in contrast, AOL Time Warner were obligated to carry multiple, unaffiliated ISPs over its network on non-discriminatory terms, those ISPs could serve as an alternative outlet for non-AOL Time Warner content, making it more likely that AOL Time Warner's affiliated ISPs would feature such content themselves to remain competitive. For all of these reasons, we conclude that our duty to ascertain that the proposed transaction serves the public interest requires us to condition our approval on the terms we describe below. We have narrowly tailored these terms to augment the terms in the FTC Consent Agreement, and to avoid duplication of those terms. Each of the conditions we impose is designed to ensure that the transaction does not interfere with the aforementioned statutory objectives.

1. Background

62. Internet access services consist principally of connectivity to the Internet provided to end users.[180] These end users may be residential consumers, businesses, content providers, or application providers. In this analysis, we focus on Internet access services provided to residential consumers.

63. The majority of residential and small business consumers who purchase Internet access services do so from ISPs offering relatively low-speed access (typically between 28 and 56 kilobits per second ("kbps")) over local telephony plant, otherwise known as "narrowband" (or "dial-up") service.[181] Customers of these ISPs typically pay $22 per month or less for unlimited usage.[182] Major nationwide

[177] *See* Letter from Stephen Heins, Director of Marketing, NorthNet, to Robert Pitofsky, Chairman, FTC, and William E. Kennard, Chairman, FCC, dated Oct. 10, 2000 ("NorthNet Oct. 10 Ex Parte") at 7 (noting that "[m]any independent ISPs have concluded that the[] terms [proposed by Time Warner] present no reasonable basis for independent ISPs to compete on a commercially viable basis," and concluding that "[b]y offering terms that are totally unacceptable, Time Warner keeps its network effectively closed"); Letter from Earl W. Comstock, Esq., Sher & Blackwell, Counsel for EarthLink, to Magalie Roman Salas, Secretary, FCC, dated Oct. 18, 2000 ("EarthLink Oct. 18 Ex Parte") at 1 (arguing that the terms of Time Warner's recent proposals "would make the arrangements economically infeasible for ISPs not affiliated by ownership with the applicants").

[178] More subtle discrimination by AOL Time Warner would also narrow the public's access to information from diverse sources, though in more subtle ways: AOL Time Warner's cable customers would have a "choice" between using affiliated ISPs on the one hand or unaffiliated ISPs relegated to offering an inferior product on the other.

[179] Discrimination by AOL Time Warner against unaffiliated ISPs with respect to carriage on the company's cable network would facilitate discrimination by AOL Time Warner in favor of its own broadband content by enabling the merged firm to exclude non-AOL Time Warner content from its Internet access services without facing competitive pressure from other ISPs on the same cable network who would presumably supply non-AOL Time Warner content.

[180] We refer to "Internet access services," in the plural, to reflect the fact that such services offer differing speeds of access; technical performance; price; availability of customer support; and extent of content. Our use of the term "Internet access services" is meant to encompass services provided not only by ISPs, but also by so-called online service providers ("OSPs"), such as AOL, which combine content with Internet access services.

[181] While the fastest of narrowband modems have the theoretical capability to support 56 kbps downstream, Commission regulations limit narrowband modems to 53 kbps.

[182] *See* *ISP Buyer's Guide: Dial-Up ISPs*, CNET INTERNET, at http://home.cnet.com/internet/0-3762-7-
(continued...)

dial-up ISPs include AOL, AT&T's WorldNet, MSN, and EarthLink. LECs operating within their service territories, Erol's, and thousands of other ISPs offer service locally or regionally.[183] High-speed (or "broadband") Internet access is available through several different technologies, including cable, digital subscriber line ("DSL"),[184] fixed terrestrial wireless, and satellite.[185] In general, high-speed access enables consumers to communicate over the Internet at speeds that are many times faster than the speeds offered through dial-up telephone connections. With high-speed Internet access, consumers can send and view content with little or no transmission delay, utilize sophisticated "real-time" applications, and take advantage of other high-bandwidth services.

64. Cable operators that provide high-speed Internet access services to their subscribers often do so by purchasing some components of such services from another company. In particular, a cable operator typically contracts with an Internet connectivity provider (such as Road Runner, Excite@Home, or High-Speed Access Corporation)[186] to link its cable headend to the Internet, which entails providing routers, servers, and a dedicated Internet connection.[187] The cable operator, in turn, generally retains responsibility for installing the modems upon which end users rely, for upgrades to the cable system plant, and for marketing. The cable operator and the Internet connectivity provider often divide billing and technical support functions. From the perspective of the consumer, these services form one product -- residential high-speed Internet access service.

65. Presently, the majority of residential high-speed Internet users connect to the Internet via cable. The main competitor to cable in the market for residential high-speed Internet services is currently DSL, which LECs provide over existing telephone plant.[188] As of November 2000, there were

(...continued from previous page)
2518427.html?tag=st.int.3762-7-2518426txt.3762-7-251842 (visited Dec. 5, 2000).

[183] NorthNet indicates that there are "7,000 or so ISP's throughout the United States." *See* NorthNet Oct. 10 Ex Parte at 1.

[184] Generally, unless we state otherwise, our references to "DSL" throughout this Order refer to asymmetric DSL ("aDSL"). Asymmetric DSL is the most common variant of DSL used by residential customers, and is available at various speeds ranging up to 6.1 mbps downstream and 640 kbps upstream. *See Second 706 Report*, FCC 00-290 at ¶ 36; *id.* at ¶ 47. Presently, at lowest cost, aDSL service usually provides transmission at 384-640 kbps downstream and 90-128 kbps upstream.

[185] The Commission's *Second 706 Report* contains a detailed description of high-speed Internet access *via* various technologies. The characteristics of the services offered via these respective technologies may vary. *See generally Second 706 Report*. The *Report* defines "high-speed" services as "those services with over 200 kbps capability in at least one direction." *Id.* at 8. It distinguishes such services from "advanced services," which it defines as the "subset" of high speed services "capable of 200 kbps or greater transmission in *both* directions." *Id.* (emphasis in original).

[186] We note that Excite@Home and Road Runner also function as high-speed ISPs.

[187] A cable headend is "the origination point for signals in the cable system. It has parabolic or other appropriately shaped antennas for receiving satellite-delivered program signals, high-gain directional antennas for receiving distant TV broadcast signals, directional antennas for receiving local signals, machines for playback of taped programming and commercial insertion, and studios for local origination and community access programming." Walter Ciciora et al., MODERN CABLE TELEVISION TECHNOLOGY 12 (1999). The headend also houses all equipment for connection of the cable system to the Internet. *Id.*

[188] With the addition of certain electronics to the telephone line, carriers can transform the copper loop that already provides voice service into a conduit for high-speed data traffic.

approximately 3 million customers in the United States accessing the Internet via cable[189] and more than 1.7 million accessing it via DSL lines.[190] Although DSL subscriptions appear to be growing at a faster rate than cable Internet subscriptions,[191] analysts differ as to whether and how quickly DSL will catch up with cable.[192] Excite@Home and Road Runner are the two largest high-speed ISPs, serving a majority of all high-speed subscribers.[193] The remaining subscribers are splintered among a handful of other cable operators that do not offer Internet access services through Road Runner or Excite@Home, and a number of DSL, fixed wireless, and direct broadcast satellite ("DBS") competitors.[194]

66. Residential high-speed Internet access services are also provided through satellite technology, which employs a radio relay station in orbit above the earth to receive, amplify, and redirect signals. Satellite-based Internet access services are offered by DBS providers such as DirecTV, and may be offered within the next several years by low earth orbit ("LEO") satellites deployed by firms such as Teledesic. At present, satellite-based Internet access services can supply high-speed transmission only in the "downstream" direction, that is, from the Internet to the end user's home; the end user must use narrowband telephone lines for the "upstream" transmission of data from the home to the Internet.[195] Although satellite providers are working to address this deficiency, two-way high-speed transmission facilitated by satellite may not be widely available for several years.[196] As of today, DBS providers

[189] Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://www.cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000).

[190] TeleChoice, Inc., *TeleChoice DSL Deployment Summary – Updated 11/13/00*, at http://www.xdsl.com/content/resources/deployment_info.asp (visited Nov. 14, 2000). Of these customers, approximately 67%, or 1,160,000, are residential. We note that the Commission has undertaken a semi-annual data collection concerning high-speed Internet access subscribers. *See* Federal Communications Commission, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf. The foregoing report found one million DSL subscribers and 2.2 million cable modem subscribers as of June 30, 2000. We use other publicly available sources here because they are more recent.

[191] *Second 706 Report*, FCC 00-290 at ¶¶ 191-96. In the past 18 months, numerous companies have made substantial investments in DSL. For example, SBC Corp. has announced plans to invest $6 billion in an infrastructure deployment throughout its 13-state region in order to make DSL available to nearly 77 million homes. *See* SBC Communications, Inc., *SBC Set to Trial DSL Neighborhood Broadband Gateways* (press release), Aug. 23, 2000; SBC Communications, Inc., *SBC Launches $6 billion Broadband Initiative* (press release), Oct. 18, 1999.

[192] *See* Confidential Appendix IV-A-1, Note 1.

[193] Excite@Home has approximately 1.7 million subscribers in the United States. *See* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=ATHM&script=410&layout=-6&item_id=131059 (visited Nov. 14, 2000). RoadRunner has 1.1 million subscribers in the United States. *See* Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[194] *See* Kinetic Strategies, Inc., *Commercial Cable Modem Launches in North America*, CABLE DATACOM NEWS, at http://CableDatacomNews.com/cmic/cmic7.html (visited Nov. 14, 2000) (listing cable high-speed Internet launch locations and ISPs). Examples of other ISPs serving cable subscribers include the ISP Channel and Adelphia PowerLink serving Adelphia customers, and High Speed Access serving Charter customers.

[195] One company, StarBand, in partnership with Microsoft and Gilat-to-Home, offers two-way satellite transmission for Internet access, but the speeds generally do not reach or exceed 200 kbps in both directions except during off-peak hours (midnight to six in the morning). Conversation with StarBand Customer Service, Dec. 4, 2000 at 1-877-827-4290; *see also* http://www.starband.com (visited Dec. 4, 2000).

[196] *But see* Peter S. Goodman, *Dishing Up a New Link to the Internet*, WASH. POST, Nov. 6, 2000, at A1 (reporting inception of two-way high-speed service by Starband/Gilat-to-Home).

offering the "one-way" technology have captured only a very small share of the market for residential high-speed Internet access services.[197]

67. Finally, residential high-speed Internet access services are also being offered -- albeit on a much smaller scale as yet -- through "fixed wireless" technologies, including local multipoint distribution systems ("LMDS") and multichannel multipoint distribution systems ("MMDS"). Fixed wireless technology typically employs microwave transmission facilities to transmit data to and from residential consumers. Although several firms have made significant investments to develop fixed wireless technology, high-speed Internet access services using such technology is not yet widely available to consumers, and may not be commercially deployed for use by residential consumers on a large scale in the immediate future.[198]

2. Discussion

a. Relevant Markets

68. The possibility that AOL Time Warner would engage in anticompetitive conduct must be evaluated in the context of relevant markets. A relevant market is the smallest market -- defined in terms of both the pertinent product and the pertinent geographical area -- for which the elasticity of demand is sufficiently low that a firm supplying the entire market could profitably reduce output and elevate its price substantially over a sustained period of time.[199] In defining the relevant market, it is useful to analyze whether the firm at issue could profitably impose a "small but significant and non-transitory" increase in price, *i.e.*, could raise prices without losing a significant portion of sales to competitors.[200]

69. We begin by addressing whether high-speed Internet access services, as distinct from narrowband services, constitute the relevant product market in determining the effects of the proposed merger on the public interest.[201] We conclude that they do.[202] We find particularly significant the fact

[197] *Second 706 Report*, FCC 00-290 at ¶ 111.

[198] The most significant firms in upperband fixed wireless services are Teligent, Inc. and Winstar Communications Inc., which target business (not residential) customers. The most significant firms in lowerband MMDS fixed wireless services are WorldCom and Sprint. *Second 706 Report*, FCC 00-290 at ¶¶ 42-55, 107-10.

[199] William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

[200] *See generally* Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. 41,552 (dated Apr. 2, 1992, as revised Apr. 8, 1997).

[201] Although the record in this proceeding does not reflect much debate over this question, it has engendered considerable disagreement in other recent proceedings before the Commission. *See, e.g., AT&T-MediaOne Order*, 15 FCC Rcd at 9866 ¶ 116 (noting "rigorous debate on the record" regarding whether a separate market exists for residential high-speed Internet access service).

[202] As we explain further below, our finding in this proceeding that residential high-speed Internet access services constitute a product market distinct from narrowband services will not restrict the Commission's ability to consider market definition questions that may arise in the context of the *Notice of Inquiry* concerning high-speed Internet service or any other future Commission proceeding. As we have previously noted, "[a]n individual proceeding in which the Commission defines relevant product and geographic markets, such as a proposed license transfer, may present facts pointing to narrower or broader product markets" than those defined in a proceeding that does not focus on license transfers. *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, FCC 00-29 (Aug. 18, 2000) ("Fifth Annual CMRS Competition Report") at 3 n.4. Moreover, we recognize that the exercise of defining relevant markets is inherently dynamic, reflecting ongoing changes in the costs of providing various services and in the tastes and preferences of consumers. It would be particularly

(continued...)

that high-speed Internet access services include features unavailable over narrowband, such as access to high-bandwidth content that is impractical over dial-up connections. Analysts agree that over time the Internet will become a more absorbing experience, in which dynamic content supplements and supplants static pages of information.[203] Even at present, the experience of "surfing" the Internet is more immediate and efficient over high-speed connections, at which users can move between texts as if they were flipping pages of a book. Increasingly the Internet is also becoming a multimedia experience, complete with film and audio clips as well as other high-bandwidth applications. Full-screen video is already commonly available over the Internet, and other applications, such as video-on-demand, telemedicine, full-featured software applications, and distance learning are available or under development.[204] Such applications so completely change the experience of using the Internet that the difference can be likened to the contrast between looking at a still photograph and watching a movie.[205] The existence of high-speed transmission is necessary to spur development of such applications, and consumers with narrowband connectivity are unable to experience (or in some instances even access) such content in the manner intended, *i.e.*, rapidly and in real-time.[206]

70. Another factor supporting our conclusion that high-speed Internet access services constitute a discrete market is the high consumer costs involved in switching to a high-speed platform. Consumers switching to high-speed service from dial-up (or between high-speed services) experience costs significantly higher than those involved in switching between dial-up providers. Switching between dial-up services typically entails a telephone call, a software download, and rarely, a one-time connection fee

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appropriate to revisit issues of market definition in a period of rapid technological change and service convergence, as the factual predicates underlying a market definition in one proceeding may no longer be valid at the time of another proceeding.

Separately, we note that the FTC, in its analysis of the proposed merger, concludes that a relevant input market consisting of ISP purchases of high-speed data transmission services also exists. *See* Federal Trade Commission, *In the Matter of America Online, Inc. and Time Warner Inc.*, Docket No. C-3989 ("FTC Complaint") at 3, 5, 6. We find that any concerns we share with respect to this market are adequately addressed in our analysis of the consumer market for high-speed Internet access services, which is usually supplied using these transmission services as an input.

[203] *See, e.g.*, George Gilder, TELECOSM: HOW INFINITE BANDWIDTH WILL REVOLUTIONIZE OUR WORLD 252 (2000); Francois Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, TELECOMMUNICATIONS POLICY, July-Aug. 2000, at 7; Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999, at http://www.zdnet.com/zdnn/stories/news/0,4586,2281301,00.html (visited Nov. 14, 2000).

[204] *See* RealNetworks, Inc., *Full Screen Video with RealPlayer Plus 5.0, G2, 7, and 8*, at http://service.real.com/fullscreen/default.html (visited Nov. 14, 2000) (full screen video); Pixelon, Inc., at http://www.pixelon.com (visited Nov. 14, 2000) (same); Infovalue Computing, Inc., at http://www.infovalue.com (visited Nov. 14, 2000) (video-on-demand applications); University of Virginia, at http://www.telemed.virginia.edu/ (visited Nov. 14, 2000) (telemedicine); Arizona State University, *ASU Distance Learning Technology*, at http://www-distlearn.pp.asu.edu (visited Nov. 14, 2000) (distance learning).

[205] Indeed, narrowband users cannot watch television- or film-quality video clips via the Internet unless they download such clips in their entirety in advance before playing them, a process that is prohibitively time-consuming over narrowband connections for all but the shortest clips. Users with high-speed Internet access, in contrast, can obtain "streaming" software that enables them to view television- and film-quality video clips with little or no delay after clicking on an appropriate link.

[206] *See, e.g.*, Dain Rauscher Wessels, *Bullish on Broadband*, June 8, 2000, at 22; Kathy Kincade, *Top 10 Telemedicine Programs for 1999: Experience Pays Off*, TELEHEALTH MAGAZINE, at http://www/telehealthmedmag.com (visited May 19, 2000).

on the order of $25.[207] In contrast, switching from dial-up to high-speed service often entails several telephone calls, at least one installation visit from a high-speed service provider, and a fee on the order of several hundred dollars to cover the cost of the installation and a high-speed modem.[208] Furthermore, switching to high-speed service may also necessitate upgrading the end user's PC to one with the requisite microprocessing capacity and an Ethernet port for cable modem attachment; such an upgrade may increase the cost of switching by a thousand dollars or more.[209]

71. The record developed in *AT&T-MediaOne* also supports our definition of the relevant market for high-speed Internet access services. In that proceeding, numerous commenters raised the issue of market definition, and all who addressed the issue (other than AT&T and MediaOne) maintained that residential high-speed Internet access services constitute a market separate from narrowband services.[210] The commenters cited the following reasons (among others):

- High-speed Internet access services support all the content and applications that narrowband access services do, but also allow access to services that will never be technically feasible over narrowband.[211]

[207] *See,e.g.*, EarthLink, Inc., at http://www.earthlink.net/join (visited Nov. 14, 2000). EarthLink normally charges a $25 set-up fee, but that fee is waived if the customer signs up over the Internet.

[208] *See Second 706 Report*, FCC 00-290 at App. C., ¶ 10 & nn. 2, 8; *see also* Deja.com, Inc., *Bell South: User Reviews*, at http://www. deja.com/products/at_a_glance/glance.xp?PDID=8378 (visited Nov. 14, 2000) (describing difficulties such as numerous installation visits and customer service telephone calls, neither of which guaranteed full and successful installation); United States General Accounting Office, *Telecommunications: Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, GAO-01-93, Oct. 2000, at 18 (indicating that both DSL and cable modem service require a higher price than dial-up Internet access service, and that DSL involves additional installation fees); Excite@Home, Inc., at http://www.home.com/xfooter/pricing.html (visited Dec. 4, 2000) (indicating that Excite@Home costs between $39.95 and $44.95 per month, dial-up costs between $14.95 and $21.95, and DSL costs between $39.95 and $189.96 (with additional ISP charges); but including the cost of a second phone line in calculating cost of dial-up service); Road Runner Corp., at http://rrcorp.central.rr.com/hso/explore_pricing.asp (visited Dec. 4, 2000) (indicating similar monthly fees); Verizon Communications, Inc., at http://www.bell-atl.com/infospeed/more_info/pricing.html (visited Dec. 4, 2000) (indicating that Verizon offers DSL service starting at $39.95 per month with no installation or equipment charges if the customer self-installs the service, and a $120.00 installation charge if a technician visit is required).

[209] *See* Walter S. Mossberg, *Those in the Market for a PC: Heed the Fall Buyer's Guide*, Oct. 19, 2000, at http://ptech.wsj.com./archive/ptech-20001019.html (visited Jan. 2, 2001) (noting that high-speed connections typically require an Ethernet port). Some consumers with older computers may need to upgrade their computers in order to meet the minimum technical requirements for high-speed access service. For instance, ZDNET reports that, "The basic requirements for a system to work with today's cable modems are either a PC with at least a 66 Mhz 486 processor or a Macintosh with at least a 68040 processor, and 16 Mb of memory. Of course performance will improve with faster processors and more RAM on either platform. The Road Runner service recommends 32 Mb of RAM and a 166 Mhz Pentium or 250 Mhz PowerMac." ZDNET, *What You Need and Getting Connected*, at http://www.zdnet.com/zdhelp/stories/main/0,5594,2278598-4,00.html (visited Dec. 4, 2000). Technical requirements for DSL are similar. *See id.*

[210] *Applications for Consent to Transfer of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CC Docket No. 99-251, Bell Atlantic Comments at 28-34; *id.*, GTE Comments at 14-29; *id.*, MCI Comments at 9; *id.*, U S West Comments at 14-15; *id.*, *Declaration of Rubinfield and Sidak* (Attachment to GTE Comments) at 11. *But see id.*, AT&T Reply Comments at 69, 71-75 (arguing that high-speed and narrowband Internet access services constitute part of the same market).

[211] *Id.*, Bell Atlantic Comments at 30; *id.*, GTE Comments at 14-18 & Appendix B at 11 (*Declaration of Rubinfeld and Sidak*); *id.*, U S West Comments at 14-15.

- High-speed access services are "always on," a feature currently unavailable over narrowband access services.[212]

- Preliminary quantitative studies indicate that narrowband and high-speed access services occupy separate markets.[213]

These reasons corroborate our finding in this proceeding that a separate market for high-speed Internet access services does exist.

72. We also find it noteworthy that AOL itself argued in the *AT&T-TCI* merger proceeding that high-speed Internet access services occupy a market separate from narrowband services, and that AOL does not contradict its earlier position here.[214] AOL's comments in *AT&T-TCI* did not include a formal market definition, but they referred repeatedly to the merged firm's potential position as the "dominant provider of . . . broadband data transport"[215] in the "nascent broadband marketplace."[216] While AOL and Time Warner do not maintain in this proceeding that there is a separate market for high-speed Internet access services, they do not deny the existence of such a market.[217]

73. Finally, we note that the Department of Justice ("DOJ"), analyzing the relevant market in the course of its review of the AT&T-MediaOne merger, found that high-speed Internet access services occupy a market separate from narrowband services. DOJ defined this separate market as one encompassing the "aggregation, promotion, and distribution of broadband" content and services;[218] under its analysis, the market includes the transmission facilities used for distribution of broadband content and services, as well as portals that aggregate and market that content.[219] DOJ further found that narrowband Internet service is not a substitute for broadband service, as "[m]uch of this broadband content will not be readily accessible or attractive to narrowband users, because of the much longer times that are needed to transmit the data through narrowband facilities."[220]

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[212] *Id.*, Bell Atlantic Comments at 30; *id.*, GTE Comments at 14.

[213] *Id.*, *Declaration of Rubinfeld and Sidak* (Attachment to GTE Comments) at 8 (citing *Declaration of Professor Jerry A. Hausman* at ¶¶ 4-10 (Attachment to Comments of America Online, Inc., *in Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Dkt. No. 98-178)); *see also* Hal R. Varian, *Estimating the Demand for Bandwidth*, Aug. 1999, at http://www.sims.berkeley.edu/~hal/Papers /wtp/wtp.pdf.

[214] *Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Comments of America Online, *passim*.

[215] *Id.* at 16.

[216] *Id.* at 32.

[217] The Applicants contend that regardless whether the relevant market is defined to include narrowband and broadband Internet access services or broadband Internet access services alone, the proposed merger would not undermine competition. *See* Applicants' Reply Comments at 21-23.

[218] DOJ Consent Decree at ¶ 25 (Competitive Impact Statement).

[219] *Id.* at ¶¶ 25-27.

[220] *Id.* at ¶ 22.

74. The relevant geographic markets for residential high-speed Internet access services are local.[221] That is, a consumer's choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (*e.g.*, DSL or wireless), or may offer service over much wider areas, even nationally (*e.g.*, satellite), a consumer's choices are dictated by what is offered in his or her locality.

b. Applicants' Roles in the Relevant Market

75. AOL is the largest provider of narrowband Internet access services in the United States and worldwide. The Company's flagship AOL service provides Internet access to more than 26 million subscribers around the globe. AOL also owns another ISP, CompuServe (acquired in 1998), that serves more than 2.8 million customers.[222] AOL is the only narrowband ISP with a double digit worldwide market share, and boasts a customer base nearly five times larger than its nearest competitor, EarthLink.[223] Time Warner does not provide narrowband Internet service.

76. Time Warner owns the second largest cable network in the United States, one that serves approximately 13 million subscribers and passes nearly 21 million homes.[224] When the Application was filed, 85 percent of its network already supported high-speed Internet access services, and Time Warner claimed that the remainder would do so by the end of 2000.[225] Time Warner provides high-speed Internet access services to its cable customers through an exclusive contract with Road Runner, the nation's second largest provider of such services in the residential market.[226] That contract expires in December

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[221] We note that the FTC, in the complaint underlying its order approving the AOL-Time Warner merger, identified the relevant geographic markets as "Time Warner cable service areas and the United States." FTC Complaint at 5. We construe the FTC's reference to the "United States" to denote non-Time Warner, local cable service areas throughout the United States, and we therefore perceive no inconsistency between the FTC's delimitation of the relevant geographic markets and our own. We further note that both the FTC's definition of the relevant geographic markets and ours recognize that the competitive effects of the merger will differ between Time Warner cable service areas and other service areas.

[222] *See* America Online, Inc., *AOL Gears Up For Holiday Shopping Blitz With Best Partners, Most Convenient Tools, And Industry's Leading E-Commerce Performance* (press release), Nov. 15, 2000.

[223] *See* Internet.com Corporation, *Top US ISPs by Subscriber*, at http://www.isp-planet.com/research/rankings_usa.html (visited Nov. 15, 2000). We note that submissions of Disney and EarthLink contend that AOL's worldwide market share is as high as 50 percent. *See* Written Ex Parte Filing of The Walt Disney Company (July 25, 2000) ("Disney July 25 Ex Parte"), transmitted by letter from Lawrence R. Sidman et al., Esq., Verner, Liipfert, Bernhard, McPherson & Hand, Counsel for The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated July 25, 2000, at 15 (citing Yankee Group, *AOL Time Warner in the Context of Consumer Online Migration* (2000)); EarthLink Oct. 18 Ex Parte at 2. For an explanation of Disney's market share calculation, *see* Letter from Marsha J. McBride, Vice President Government Relations, The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated Nov. 27, 2000 ("Disney Nov. 27 Ex Parte") at 2.

[224] Applicants' March 21 Supplemental Information at 8.

[225] Time Warner Inc., *Time Warner Cable, Overview*, at http://www.timewarner.com/corp/about/cablesys/index.html (visited July 31, 2000).

[226] Road Runner is a joint venture among Time Warner, affiliates of MediaOne Group, Inc., Microsoft Corp., Compaq Corp. and the Advance/Newhouse Partnership. Time Warner currently holds a 40 percent ownership stake in Road Runner; however, in a press release issued on December 18, 2000, Time Warner announced that it would increase this stake and manage Road Runner's operations. *See* Time Warner Inc., *Time Warner To Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000 ("Time Warner Dec. 18 Press

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2001.[227] Road Runner currently serves more than 1.1 million cable modem customers[228] -- more than 26 percent of all residential high-speed Internet access subscribers -- of whom approximately 719,000, or 65 percent, reside in communities served by Time Warner cable systems.[229]

77. Although the vast majority of AOL subscribers access the Internet by means of dial-up connections, the company has sought to provide high-speed Internet access services across a variety of platforms.[230] AOL has agreements with several LECs to deliver its Internet service via DSL, and with DBS provider DirecTV to deliver its Internet service via DirecPC.[231] The record demonstrates that AOL's efforts to date to migrate consumers to its high-speed service have yielded only modest results.[232] AOL has previously been unsuccessful in gaining access to cable systems.[233] This merger, however, would give AOL direct ownership of a high-speed cable network. Upon acquiring Time Warner cable systems, AOL would be in a position to use its established brand name and proven marketing acumen to migrate many of its narrowband customers to high-speed service,[234] and to market AOL Internet access

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Release"). The restructuring is intended to satisfy the Consent Decree obtained by the United States Department of Justice against AT&T Corp., requiring that MediaOne (recently acquired by AT&T) divest its ownership interest in Road Runner on or before December 31, 2000. *See* DOJ Consent Decree; *see also* Time Warner Dec. 18 Press Release (noting that the "Road Runner restructuring . . . result[s] from a Consent Decree between AT&T and the Department of Justice in connection with AT&T's acquisition of MediaOne Group"). Time Warner's move to increase its ownership stake in Road Runner -- which will be completed by April 2001 -- will also end the arrangement providing Road Runner with exclusive carriage on Time Warner cable systems. *See* Time Dec. 18 Warner Press Release.

[227] As mentioned in the preceding note, however, Time Warner's announced restructuring of Road Runner would end the exclusive contract between the two entities by April, 2001. *See* Time Warner Press Release.

[228] Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[229] *See* Kinetic Strategies, Inc., *Cable Modem Market States & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000).

[230] AOL has formed a "strategic alliance" with Hughes Electronic Corp. to make its high-speed Internet service ("AOL-Plus") available via the DirectPC satellite Internet network. In addition, AOL has formed such alliances with several DSL providers, including SBC Communications, Inc., Bell Atlantic (now called Verizon) and GTE (since acquired by Bell Atlantic and now part of Verizon). Finally, AOL has announced agreements with Sprint PCS, Nokia, Motorola, Research in Motion, BellSouth and Arch Communications to make AOL's Internet services available through wireless devices. Applicants' March 21 Supplemental Information at 17-18; *see also* Confidential Appendix IV-D-3.

[231] AOL's high-speed product is called "AOL Plus," and provides subscribers with enhanced content including video, games, music and online shopping features. *See* Applicants' March 21 Supplemental Information at Attachment 1.

[232] *See* Confidential Appendix IV-A-2, Note 1.

[233] *See id.* Note 2.

[234] *See, e.g.*, Sanford C. Bernstein & Co., Inc. and McKinsey & Co., Inc., *Broadband! A Joint Industry Study*, Jan. 2000, ("Bernstein and McKinsey -- Broadband!") at 24 ("AOL counts fully half of the current online subscribers as its customers, giving it the opportunity to shift many customers from slow- to high-speed service. This is particularly significant in light of our survey finding . . . that the heaviest users of the Internet are also the most interested in high-speed service. AOL's customers average nearly one hour a day online, twice as much as the average online household. This supports the AOL claim that AOL's dial-up subscribers can be easily migrated to a high-speed platform."); *see also* Confidential Appendix IV-A-2, Note 3.

services to Time Warner cable subscribers.[235] Thus, the merger would create the opportunity for AOL to use cross-promotional strategies and its control over Time Warner cable networks to add millions of subscribers to its high-speed service.[236]

78. In acquiring Time Warner, AOL would obtain not only a vast network of cable systems, but also an enormous library of multimedia content. Time Warner and its content affiliates comprise the largest traditional media company in the world.[237] This company owns four of the top fifteen video programming services (CNN, TNT, TBS, Cartoon Network) and the largest premium TV network (HBO).[238] Time Warner also operates a broadcast network (The WB)[239] and one of the largest movie and television studios (Warner Bros.).[240]

79. Similarly, AOL is more than just an ISP. AOL owns many leading Internet brands and applications, including:

- AOL Instant Messenger ("AIM") and AOL Buddy List services, and ICQ instant messaging service.[241]

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[235] An estimated 8 million Time Warner cable subscribers do not subscribe to AOL. Tom Wolzien and Ray Haddad, *AOL/Time Warner: Finding the First $1 billion or so in Synergies*, Bernstein Research, Apr. 2000, at 10. Bernstein also estimates that 85% of AOL subscribers are cable subscribers. *Id.* Other sources indicate that, as of November 2000, there were approximately 4.16 million residential high-speed Internet access services subscribers. (This figure includes only cable and DSL subscribers; the number of fixed wireless and satellite residential subscribers is quite small. All cable high-speed Internet service subscribers are treated as residential, but, following industry estimates, only 67% of DSL subscribers are counted as residential.) *See* Kinetic Strategies, Inc., *Cable Modem Market Stats and Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://CableDatacomNews.com/cmic/cmic16.html (visited Nov. 14, 2000) (providing cable subscription estimates); TeleChoice, Inc., *TeleChoice DSL Deployment Summary – Updated 11/13/00*, at http://www.xdsl.com/content/resources/deployment_info.asp (visited Nov. 14, 2000) (providing DSL subscription estimates).

[236] In addition, following the merger, AOL Time Warner would have access to 1.1 million Road Runner subscribers, which amounts to approximately 26% of the approximately 4.16 million residential high-speed Internet access services subscribers. *See* Road Runner Corp., *Road Runner Sets record Third Quarter* (press release), Oct. 16 2000. If AOL were to gain access to AT&T's high-speed subscribers, *see* Confidential Appendix IV-A-2, Note 4, its reach would increase to almost 48% of residential high-speed subscribers. *See* Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://www.cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000). These numbers may actually understate AOL's post-merger market power, however, because the markets in question are local, not national. The record demonstrates that a very high percentage of homes passed by data-ready Time Warner cable systems do not also have access to DSL. *See* Confidential Appendix IV-A-1, Note 1.

[237] *See* Time Warner Inc., *Time Warner 1999 Fact Book*, at http://www.timewarner.com/corp/about/pubarchive/factbook/1999fb.pdf (visited July 31, 2000).

[238] *AOL Time Warner: World's First Internet-Age Media and Communications Company*, BUS. WIRE, Jan. 10, 2000.

[239] David Lieberman, *Inside the AOL Media Giant*, USA TODAY, Jan. 11, 2000, at 1A.

[240] *Media Owner's Index, Time Warner*, COLUMBIA JOURNALISM REV., at http://www.cjr.org/owners/timewarner.asp (visited July 31, 2000). Time Warner also owns significant print media, including Time Magazine, People, Sports Illustrated, Fortune and some twenty-eight other magazines. *See* Application at 4.

[241] See Section IV.B., *infra* (Instant Messaging and Advanced IM-Based High-Speed Services), for a detailed analysis of AOL's IM service.

- AOL.com and Netscape Netcenter, two leading Internet portals. AOL.com has nearly 32 million unique monthly visitors, while Netscape Netcenter has almost 20 million unique visitors.[242] In any given month, nearly 77 percent of all Internet subscribers will visit an AOL site,[243] with AOL members spending an average of 64 minutes per day online.[244]

- Spinner and WINamp, leading Internet music properties with 42 million customer relationships.[245]

- Digital City, the leading local online network, with more than five million unique visitors in May, 2000.[246]

- AOL MovieFone, the nation's largest online movie listing guide and ticketing service, which attracts 20 percent of all moviegoers.[247]

- MapQuest.com, which delivers more than 150 million maps and driving instructions each month.[248]

- Netscape Communicator client software, including the Netscape Navigator browser, claiming millions of users.

It has been asserted that through its family of brands, AOL "now has an unduplicated reach of roughly 80 percent of all Internet users in the United States, by far the greatest on the Web."[249]

c. Potential Public Interest Harms

80. Commenters raise a variety of competitive concerns stemming from the merged company's potential to control Internet transmission facilities, access, portals, content and applications. Generally speaking, these concerns may be summarized as follows: Unless appropriate restrictions are placed on the proposed merger, AOL Time Warner will have both the ability and the incentive to: (a) discriminate against unaffiliated ISPs on its own cable network;[250] (b) facilitate discrimination against unaffiliated ISPs

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[242] *AOL, Time Warner Merger – Road to Convergence*, BUS. WIRE, Jan. 10, 2000.

[243] Media Metrix, *Media Metrix Releases the Top 50 Web and Digital Media Properties For June 2000 and Reveals Number One Web Sites Within New Categories* (press release), July 20, 2000.

[244] America Online, Inc., *Data Points*, at http://www.corp.AOL.com/press/press_datapoints.html (visited Jan. 16, 2001).

[245] *Id.*.

[246] *Lehman Brothers June 29 Report* at 41.

[247] America Online, Inc., *Data Points*, at http://www.corp.AOL.com/press/press_datapoints.html (visited Jan. 16, 2001).

[248] *Lehman Brothers June 29 Report* at 45.

[249] *Lehman Brothers June 29 Report* at 22.

[250] *See, e.g.*, SBC Comments at 1, 19-22; Consumers Union Comments at 31-32; BellSouth Reply Comments at 14; EarthLink Oct. 18 Ex Parte at 1; Letter from Stephen Heins, Director of Marketing, NorthNet, to James Bird, Senior Counsel, FCC, dated Oct. 20, 2000 ("NorthNet Oct. 20 Ex Parte") at 2; NorthNet Oct. 10 Ex Parte at 3-5; Consumers Union Reply Comments at 8-12; Letter from David Gusky, Executive Vice President, Telecommunications Resellers Association, to William E. Kennard, Chairman, FCC, dated April 11, 2000 ("TRA
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on other cable operators' networks by leveraging control over Time Warner video programming to obtain exclusive or preferential carriage rights for AOL's high-speed Internet access service on those networks;[251] (c) limit consumers' access to the widest possible array of content on the Internet by denying unaffiliated content providers placement on AOL Time Warner's high-speed Internet access service and denying unaffiliated ISPs access to AOL Time Warner content;[252] and (d) discriminate against alternative high-speed platforms by withholding AOL Internet access service from high-speed platforms that compete with cable.[253] We address each of these concerns below.

81. As a threshold matter, we will address the argument that regardless of the magnitude of the harms, imposing conditions in this merger would be inconsistent with the Commission precedent in *AT&T-MediaOne* and the pending *Cable Access NOI*. The Applicants first contend that the Commission's merger review process is an inappropriate forum to determine whether AOL Time Warner should be required to negotiate non-discriminatory agreements with unaffiliated ISPs for access to its cable network.[254] Instead, the Applicants argue, the Commission should address that question through a rulemaking proceeding that would set "open access" policy for the entire cable industry.[255] We disagree. The Commission has a statutory duty to determine whether the proposed transaction would serve the public interest, and may not approve it absent such a finding.[256] We cannot abdicate this duty on the basis of speculation that a future proceeding might be able to remedy harms to the public interest that we believe would result from a proposed merger. As we explain below, the unconditioned merger of AOL and Time Warner would create a company with a unique incentive and ability to thwart competition in the market for residential high-speed Internet access services -- an outcome that would undermine important national policy objectives.[257]

82. Furthermore, we are not convinced that a proceeding resulting from the *Cable Access NOI* could adequately redress the public interest harms that would result from the proposed transaction. First,

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Apr. 11 Ex Parte") at 2.

[251] *See* ACA Comments at 4-5, 11-12.

[252] *See, e.g.*, Disney Reply Comments at 11-14; Letter from Lawrence R. Sidman, Esq., Verner, Liipfert, Bernhard, McPherson & Hand, Counsel for The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated July 11, 2000 ("Disney July 11 Ex Parte") at 1; BellSouth Reply Comments at 15; Consumers Union Comments at 31-32; Letter from Henry Bauman et al., Legal Department, National Association of Broadcasters, to William E. Kennard, Chairman, FCC, dated May 19, 2000 ("NAB May 11 Ex Parte") at 1-3; Letter from Sandra L. Wagner, Vice President, Federal Regulatory Affairs, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, FCC, dated May 5, 2000 ("SBC May 5 Ex Parte") at 3.

[253] *See* SBC Comments at 19-22; *see also* Consumers Union Comments at 28-29 (arguing that proposed merger would lead AOL to withdraw support from DSL platform).

[254] *See, e.g.*, Letter from Peter D. Ross, Esq. Wiley, Rein & Fielding, Counsel for America Online, to Magalie Roman Salas, Secretary, FCC, dated Sept. 20, 2000 ("Applicants' Sept. 19 Ex Parte") at 1-2.

[255] *See, e.g., id.* As earlier mentioned, the Commission recently took the first step toward such a rulemaking proceeding when it issued its *Cable Access NOI*.

[256] *See* Section II, *supra* (Public Interest Framework); *see also* 47 U.S.C. § 214(a); *id.* § 310(d); *id.* § 303(r).

[257] These policy objectives include the promotion of a competitive free market for Internet services, *see* 47 U.S.C. § 230(b)(1)-(2), the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans, *see id.* § 157 nt., and the widest possible dissemination of information from diverse and antagonistic sources to the American public, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994).

should it be a rulemaking proceeding, such a proceeding is designed to formulate rules of general applicability, and therefore would not necessarily produce requirements containing the level of specificity needed to resolve the unique concerns that arise from this proposed merger. The marriage of AOL and Time Warner would wed the nation's leading ISP with its second largest cable provider and would thereby yield a company with unprecedented potential to dominate the market for residential high-speed Internet access services.[258] The record demonstrates that the Applicants have already begun to contemplate using their combined potential in a manner that would render unaffiliated ISPs in that market unable to compete effectively.[259]

83. We believe that in order to prevent these trends from accelerating after the merger, we must impose specific conditions on our approval -- conditions that a rulemaking proceeding would be ill-suited to effectuate. Second, we believe that the conditions we impose must precede the merger itself in order to be effective. The record suggests that if AOL Time Warner were permitted to discriminate against unaffiliated ISPs in the terms and conditions of access to its cable network, many such ISPs would be unable to compete effectively, permitting the merged entity and its affiliated ISPs to attain a market-dominant position for residential high-speed Internet access services within one to two years.[260]

84. Moreover, our approval of the AT&T-MediaOne merger without any condition pertaining to Internet access services was predicated in part on our perception that alternative high-speed platforms -- especially DSL -- were rapidly gaining strength as viable competitors to cable, thereby mitigating the anticompetitive potential of the acquisition.[261] We reasoned that AOL's aggressive support of DSL would no doubt serve as a powerful impetus for incumbent LECs to deploy DSL technology in residential

[258] We note that this proposed merger would create a combined entity with both the incentive and the ability to quickly foreclose competition in the market for residential high-speed Internet access services by obtaining favorable treatment on cable systems owned by Time Warner, AT&T, and other cable operators. AOL's enormous base of existing narrowband customers and its proven marketing acumen would be combined with preferential access to Time Warner cable systems and, in all likelihood, to the facilities of AT&T and other cable operators. Such a combination would likely enable AOL to rapidly assemble a strong base of subscribers to its high-speed Internet access services. Although the AT&T-MediaOne merger presented the possibility that Excite@Home and Road Runner, the nation's two largest broadband ISPs, could theoretically foreclose competition for high-speed Internet access services through post-merger coordination, the DOJ Consent Decree required AT&T to divest its interest in Road Runner to prevent coordination between these two ISPs.

[259] *See* Confidential Appendix IV-A-2, Notes 5 and 6.

[260] *See id.*; *see also* NorthNet Oct. 10 Ex Parte at 7 ("There is no intention or possibility of allowing competitors onto [Time Warner cable networks] on [Time Warner's proposed] terms. By offering terms that are totally unacceptable, Time Warner keeps its network effectively closed."); EarthLink Oct. 18 Ex Parte at 1 (Time Warner's proposed conditions make interconnection "economically infeasible" for unaffiliated ISPs).

[261] *AT&T-MediaOne Order*, 15 FCC Rcd at 9866-68 ¶ 116-19; *id.* at 9871¶ 123. The Applicants raise this point in an October 5, 2000 *ex parte* letter, in which they point to Commission findings that there is significant actual and potential competition from alternative high-speed Internet access providers and unaffiliated ISPs, and that, in the AT&T-MediaOne merger, we relied on AT&T's and MediaOne's promise to open their platform. The Applicants further contend that competition in this market has increased, that AOL and Time Warner have committed to "open access" to Time Warner cable systems, and that the DOJ Consent Decree in *AT&T-MediaOne*, by requiring AT&T's divestiture of Road Runner, prevents a decrease in consumer choice of ISPs. *See* Letter from Peter D. Ross, Esq., Wiley, Rein & Fielding, Counsel for America Online, and Arthur H. Harding, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner, to Deborah Lathen, Chief, Cable Services Bureau, FCC, dated Oct. 5, 2000 ("Applicants Oct. 5 Ex Parte"). As we explain in this section, we find that this merger presents fundamentally different issues and potential harms than those in *AT&T-MediaOne*.

markets.[262] By giving AOL access to Time Warner's cable facilities and enhancing its ability to gain access to the facilities of AT&T and other cable operators, the merger would diminish AOL's reliance on DSL as a means of reaching subscribers[263] and would give AOL Time Warner an incentive to steer subscribers away from DSL and toward cable in Time Warner service areas.[264] In addition, the record in this proceeding demonstrates that the availability of DSL in Time Warner service areas may not be sufficiently widespread to constrain the merged firm in the market for residential high-speed Internet access services, at least in the short term.[265] For these reasons we reject the arguments that the Commission may not redress potential harms in the market for residential high-speed Internet access services.

(i) Potential Discrimination Against Unaffiliated ISPs on AOL Time Warner's Cable Network

85. Several commenters contend that a combined AOL Time Warner would engage in anticompetitive behavior in an attempt to dominate the market for residential high-speed Internet access services.[266] In particular, commenters express concern that AOL Time Warner would discriminate against unaffiliated ISPs by refusing to carry them on its cable network; by offering them carriage on unfavorable terms that would render it impossible for them to remain in business; by limiting their online features and functionalities; and by degrading their quality of service.[267] Numerous parties to this proceeding advocate the imposition of an "open access" condition on the merging parties.[268] We note at

[262] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9867-68 ¶ 117 and accompanying notes.

[263] We recognize, however, that AOL will continue to have an incentive to market its service over DSL in pursuit of its AOL Anywhere strategy.

[264] *See* Section IV.A.2.c.(iv), *infra* (High-Speed Internet Access Services). Although the Commission's recently issued Second Annual Report on the Deployment of Advanced Services indicates that DSL subscribership has grown significantly in the past year and is likely to rival cable modem subscribership in the next three to five years, *see Second 706 Report*, FCC 00-290 at 79 ¶ 191, our analysis in this proceeding must take into account the likelihood that the proposed merger would catapult AOL into a dominant position in the market for residential high-speed Internet access services before DSL or other broadband alternatives are widely available to consumers. Although AOL cannot provide service on Time Warner's cable facilities until Time Warner's exclusive arrangement with Road Runner expires or terminates, a press release issued by Time Warner on December 18, 2000, indicates that Time Warner expects to terminate the exclusivity arrangement by April 2001. *See* Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000.

[265] Such detailed data were not available in the AT&T-MediaOne proceeding.

[266] *See, e.g.*, SBC Comments at 1, 19-22; Consumers Union Comments at 31-32; BellSouth Reply Comments at 14; EarthLink Oct. 18 Ex Parte at 1; NorthNet Oct. 20 Ex Parte at 2; NorthNet Oct. 10 Ex Parte at 3-5; Consumers Union Reply Comments at 8-12; TRA Apr. 11 Ex Parte at 2.

[267] *See, e.g.*, NorthNet Oct. 10 Ex Parte at 2-7; EarthLink Oct. 18 Ex Parte at 1.

[268] *See, e.g.*, Memphis Networx Comments at 7-9; SBC Comments at 35-36; Letter from Emy Tseng et al., on behalf of students from the Massachusetts Institute of Technology and Harvard University, to Magalie Roman Salas, Secretary, FCC, dated May 1, 2000 ("MIT-Harvard Students May 1 Ex Parte"), at 2-3; Letter from Elliot Noss, President and CEO, Tucows, Inc., to Magalie Roman Salas, Secretary, FCC, dated July 31, 2000, at 2; BellSouth Comments at 22-23; Letter from Rob Todd, Member, Houston City Council, to Magalie Roman Salas, Secretary, FCC, dated May 10, 2000 ("Houston City Council May 10 Ex Parte"), at 1; NorthNet Oct. 10 Ex Parte at 2-7; EarthLink Oct. 18 Ex Parte at 1; Daytona Beach Aug. 18 Ex Parte at 7; Letter from Douglas L. Young, Executive Director of Business Development, HJN Telecom, Inc., dated Nov. 22, 2000 ("HJN Nov. 22 Ex Parte"), at 3; Petition of City of Hawthorne, California et al., for Special Relief (Sept. 29, 2000) ("California Cities' Sept. 29 (continued...)

the outset that, judging from the record in this proceeding, these commenters' concerns are persuasive. We conclude, however, that they are substantially addressed by the terms of the FTC Consent Agreement. As the FTC Consent Agreement may not entirely mitigate AOL Time Warner's ability to discriminate against unaffiliated ISPs on its cable network through indirect means, we impose certain additional conditions on the proposed transaction to avert that result. We conclude that these conditions are necessary to ensure that the proposed merger does not result in harms to the public interest that would outweigh its potential public interest benefits.

86. Our conclusion that conduct restrictions are necessary to address the potential harms described above rests on two findings: (i) that the merged company would have the incentive to discriminate against unaffiliated ISPs on its cable network and (ii) that it would have ability to do so in a manner that would undermine competition in the relevant market. We begin by noting that AOL itself has argued in other contexts that a vertically integrated cable operator offering high-speed Internet access services would have precisely such incentive and ability.[269] Our findings, however, do not depend on AOL's prior observations. The record in this proceeding points to several factors that would give the merged firm an incentive to discriminate. AOL, with 26 million narrowband subscribers, has a manifest incentive to migrate those subscribers to high-speed Internet access services as an ever-greater proportion of Internet content falls into the "broadband" category.[270] AOL has a complementary incentive to ensure that as its subscribers switch to high-speed access services, they remain customers of AOL (or one of its affiliates) and do not select a competing high-speed ISP. Excluding unaffiliated ISPs from the merged company's cable network, or discriminating against them in more subtle ways, would help achieve that objective. AOL Time Warner would also have an incentive to discriminate against unaffiliated ISPs for an additional, independent reason: the natural inclination to maximize the value of its cable network by converting its captive base of Time Warner cable customers into customers of ISPs affiliated with the merged firm.[271] This objective, too, would be facilitated by discriminating against unaffiliated ISPs with respect to carriage on AOL Time Warner cable networks.[272]

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Petition") at 1-2, transmitted by letter from William M. Marticovena, Esq., Rutan & Tucker, to FCC, dated Sept. 28, 2000.

[269] *See Joint Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries*, CS Docket No. 98-178 (October 29, 1998), Comments of America Online, Inc., *passim*.

[270] Virtually every projection for Internet access subscribers shows a decline in narrowband subscribership and growth in broadband subscribership over time. *See, e.g.*, Cable Services Bureau, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission*, Oct. 1999 ("Broadband Today"), at Appendix A. Thus, AOL would have to increase its broadband presence as the number of its narrowband subscribers drops merely to maintain its current market position. Some of the potential implications of closed high-speed Internet access networks are discussed in Earl W. Comstock & John W. Butler, *Access Denied: The FCC's Failure to Implement Open Access to Cable As Required By the Communications Act*, 8 COMMLAW CONSPECTUS 5 (2000).

[271] As an initial matter, the merged company would have this incentive because it would receive two revenue streams (ISP service and transmission) from subscribers to its affiliated ISP service, but only one revenue stream (transmission) from subscribers to unaffiliated ISPs.

[272] *Cf. Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1322 (D.C. Cir. 2000) (reasoning that Congress's concern that "cable operators have the incentive and ability to favor their affiliated programmers" is "well grounded in the evidence and a bit of economic common sense") (internal quotation marks and citation omitted).

87. We also find that AOL Time Warner would have the ability to discriminate against unaffiliated ISPs. This is well-documented in the record. As earlier mentioned, the proposed transaction would give the merged company ownership of the nation's second largest cable network. Such ownership would enable AOL Time Warner to deny unaffiliated ISPs carriage on this network at will.[273] Due to the size of the network and its dominance in the geographic areas to which it extends, AOL Time Warner's ownership rights would also empower the merged company to deal with unaffiliated ISPs requesting carriage by offering them "take it or leave it" agreements based on terms that would render it difficult if not impossible for these ISPs to provide service over cable profitably.[274] And of course, AOL Time Warner's physical control over the network would allow it to limit the online features and functionalities of unaffiliated ISPs or to degrade their quality of service, conceivably in ways that would escape easy detection.[275]

88. Finally, we note that the proposed merger would strengthen AOL Time Warner's ability to discriminate against unaffiliated ISPs on its cable network by bringing AOL and Road Runner under common ownership.[276] Road Runner is the nation's second largest high-speed ISP.[277] The elimination of

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[273] At present, neither the 1996 Act nor Commission rules would prevent AOL Time Warner from denying unaffiliated ISPs carriage on its cable network at its discretion. As earlier mentioned, the Commission recently initiated a *Notice of Inquiry* inviting comment on, among other matters, whether cable operators should be obligated to provide "open access" to ISPs requesting interconnection with their cable networks. *See Cable Access NOI.*

[274] For further discussion, see Confidential Appendix IV-A-2, Notes 5 and 6. This problem is exacerbated by the fact that DSL, the primary competitor to cable for residential high-speed Internet access services, is not available to many households at present. One analyst estimates that less than 50% of households have access to DSL due to distance and network limitations. *See* Bernstein and McKinsey – Broadband! at 9. Another analyst estimates that, "By year end 2000, we expect that total DSL service will be available to more than 50% of all telephone lines." Dain Rauscher Wessels, *Bullish on Broadband*, Jun. 8, 2000, at 59.

[275] Disney Reply Comments at 12-14. Disney further discussed and expanded upon this point in later ex parte filings, especially in regard to the return path for interactive television. *See* Supplemental Memorandum of The Walt Disney Company Prepared by Eric Haseltine, Ph.D. (Sept. 25., 2000), transmitted by letter from Marsha J. McBride, Vice President for Government Relations, The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated September 26, 2000 ("Disney Sept. 26 Ex Parte at Haseltine Memo"); Ex Parte Submission of The Walt Disney Company: Deployment of Interactive Television Technology and Return Path Discrimination (Oct. 25, 2000) ("Disney Oct. 25 Ex Parte") at 4-5, transmitted by letter from Lawrence R. Sidman et al., Esq., Verner, Liipfert, Bernhard, McPherson & Hand, Counsel for The Walt Disney Company, to FCC, dated Oct. 25, 2000. The Disney Oct. 25 Ex Parte filing indicates that cable modem equipment in the headend can be used to "delay or completely delete unaffiliated content" using capabilities included in the cable industry's DOCSIS 1.1 Specification. Disney Oct. 25 Ex Parte at 5. The filing quotes Cisco Systems, a supplier of such technology, as putting "absolute control" over the delivery of content in the hands of the cable operator. *Id.*, quoting *Cisco Systems White Paper, Controlling Your Network – A Must for Cable Operators* at 3 (1999); *see also* Consumers Union Comments at 105-07.

[276] *See* Confidential Appendix IV-A-2, Note 7. Under the terms of an Order to Hold Separate issued by the FTC in conjunction with the FTC Consent Agreement, the merged firm must operate AOL and Road Runner in a separate and independent manner until AOL itself gains access to Time Warner cable systems. *See* FTC Order to Hold Separate at 5. AOL, in turn, is barred by the FTC Consent Agreement itself from accessing Time Warner cable systems until EarthLink has obtained such access. *See* FTC Consent Agreement at II.A-B. The combined effect of the FTC Order to Hold Separate and the FTC Consent Agreement is to prevent the merged firm from integrating AOL and Road Runner until it has begun to open its cable systems to unaffiliated ISPs. Once it has done so, however, it is free to integrate the two ISPs.

[277] *See* Internet.com Corporation, *Top US ISPs by Subscriber*, at http://www.isp-planet.com/research/rankings_usa.html (visited Nov. 15, 2000). This web site contains a list of all ISPs in the country. Road Runner is (continued...)

potential competition between AOL and Road Runner in the market for residential high-speed Internet access services would significantly enhance AOL Time Warner's power in this market. And by adding to the merged firm's lead in subscribership for residential high-speed Internet access services, it would diminish AOL Time Warner's incentive to adopt an "open access" regime with respect to its cable network.[278]

89. The Applicants maintain that, far from having an incentive to discriminate against unaffiliated ISPs, a combined AOL Time Warner would have an incentive to permit these ISPs to interconnect with its cable network so as to encourage the adoption of "open access" policies by other cable providers.[279] AOL Time Warner would need to promote the adoption of such policies, the Applicants maintain, in order to ensure the availability of AOL Internet services on other cable platforms. Time Warner's cable network currently serves less than 20% of all cable subscribers nationwide -- a figure which, arguably, underscores how dependent AOL Time Warner would be on other cable providers for access rights.[280]

90. Notwithstanding the Applicants' reasoning, we are not convinced that AOL Time Warner would need to refrain from discriminating against unaffiliated ISPs on its own cable platform in order to secure carriage for AOL Internet services on the platforms of other cable providers. We find it implausible that AOL Time Warner -- with the leading brand among ISPs as well as the largest library of proprietary content in the world at its disposal -- would be unable to leverage these resources and others to obtain carriage for AOL Internet services on the facilities of unaffiliated cable operators. Despite AOL's previous difficulties in obtaining access to cable lines, the addition of Time Warner's content and other resources greatly increases the merged company's leverage in this area. And we are equally certain that the merged firm would be able to obtain such carriage regardless of whether it were to discriminate against unaffiliated ISPs on its own platform. Accordingly, we reject Applicants' contention that AOL Time Warner would not discriminate because of a putative need to support industry-wide "open access" policies.

91. The Applicants' primary response to commenters' contentions that the merged firm would discriminate against unaffiliated ISPs on its cable network is that AOL and Time Warner have issued a joint Memorandum of Understanding (the "MOU") voluntarily committing themselves to negotiate commercial agreements under which unaffiliated ISPs may connect with Time Warner's cable network on a non-discriminatory basis.[281] Applicants contend that adherence to the MOU should not become a

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the number two high-speed ISP listed (after Excite@Home), and ranks number thirteen overall. *See id.*

[278] To the extent AOL Time Warner would have any incentive to adopt an "open access" regime with respect to its cable network, such an incentive would be based on the merged firm's desire to attract the business of unaffiliated ISPs dominant in certain niches within the residential high-speed Internet access market. The greater AOL Time Warner's own dominance across those niches, the lesser its incentive to permit unaffiliated ISPs to interconnect with its network.

[279] *See* Applicants' March 21 Supplemental Information at 24; Applicants' Reply Comments at 5, 11.

[280] *See* Paul Kagan Assocs., Inc., *Top Cable System Operators as of March 2000*, Cable TV Investor, June 9, 2000, at 11.

[281] Memorandum of Understanding Between Time Warner Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000) ("MOU") at 1-2. The MOU expresses the Applicants' commitment to:

- Form an agreement "as quickly as possible" to provide high-speed AOL service on Time Warner cable systems; that agreement will be used as a model for agreements with other ISPs.

(continued...)

condition of merger approval.[282] They assert that a government mandate regarding ISP access would be wholly inappropriate and, in any event, should be considered (if at all) only in a proceeding of general applicability such as the *Cable Access NOI*.[283]

92. We find that if unaffiliated ISPs were permitted to offer their services over AOL Time Warner's cable network on non-discriminatory terms and conditions, the merger's potential to undermine competition in the relevant market would be mitigated.[284] Unaffiliated ISPs in areas served by AOL Time Warner's cable network would have the opportunity to compete fairly on price and quality, and residential consumers in these areas would be able to choose a high-speed ISP based on the best combination of those characteristics. Market forces, not control of a bottleneck facility, would determine the firms that would succeed in the relevant market, thereby enhancing efficiency and consumer welfare.

93. However, we are not convinced that the MOU alone will achieve these goals and mitigate the potential harms to competition that we have described. Broadly speaking, our concerns are twofold. First, even if it were legally enforceable, the MOU by itself would fail to offer unaffiliated ISPs adequate

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- Negotiate commercial agreements with unaffiliated ISPs so that consumers need not purchase service from affiliated ISPs. There will be no fixed limit on the number of ISPs using Time Warner cable systems; however, that number may be limited based on considerations of quality of service and technical limitations.

- Actively encourage other cable operators to provide consumers with a choice of high-speed ISPs.

- Not discriminate on the basis of whether an ISP is affiliated with AOL Time Warner. While the economic arrangements between Time Warner and connecting ISPs may differ depending on a number of factors (such as the speed, marketing commitments, and the nature and tier of service that unaffiliated ISPs may desire), variations in the economic arrangements (and in ISP traffic) will not be based on affiliation or non-affiliation.

- Not block or limit video streaming.

- Allow ISPs to connect to Time Warner cable systems without purchasing high-speed backbone transport from AOL Time Warner.

- Offer ISPs "the choice to partner with" AOL Time Warner on a national, regional or local basis, without "red-lining."

- Allow both the cable operator and the ISP the opportunity for a direct relationship with the consumer. Both the cable operator and the ISP will be allowed to market and sell high-speed service directly to customers; if the cable operator sells high-speed Internet access services to the customer, the cable operator will be responsible for billing and collection; if the ISP sells its service to the customer, the ISP will be responsible for billing and collection if the ISP so chooses.

Id.

[282] *See* Applicants' Reply Comments at 16-18, 29-30; Applicants' Sept. 19 Ex Parte at 1-2.

[283] *See* Applicants' Sept. 19 Ex Parte at 1-2.

[284] Such a non-discrimination requirement would not prevent AOL Time Warner from facilitating discrimination against unaffiliated ISPs on the networks of other cable operators by obtaining exclusive or preferential deals for access by its own Internet services to other operators' networks. We address this potential harm below.

protection against discrimination by a merged AOL Time Warner. Second, the MOU on its own is not legally enforceable, and reports regarding the terms of access that Time Warner has proposed to certain unaffiliated ISPs cast doubt on the company's commitment to implement the principles underlying the MOU in a manner that would avert the merger's potential deleterious effects on the relevant market. We discuss each of these concerns in turn.

94. Although the MOU represents a commendable statement of principles, it does not address several specific areas in which unaffiliated ISPs connecting to Time Warner cable networks could be treated less favorably than affiliated ISPs. For example, it seems likely that in many cases, Time Warner cable subscribers who desired cable-based high-speed Internet access services would call Time Warner with their initial inquiries. Such inquiries would give Time Warner the opportunity to steer prospective customers toward affiliated ISPs (such as AOL, CompuServe, or Road Runner), a practice the MOU does nothing to prohibit. The MOU also leaves unaffiliated ISPs vulnerable to discrimination by AOL Time Warner in other facets of their business. In particular, it does not prohibit AOL Time Warner from requiring unaffiliated ISPs to display an AOL Time Warner "brand" or "presence" on the customer's first screen as a condition of carriage; does not prohibit AOL Time Warner from disadvantaging unaffiliated ISPs by offering them logistically unfavorable connection points; and does not prohibit AOL Time Warner from restricting the features and functionalities available to unaffiliated ISPs in several technical areas (such as caching capability; multicasting; address management; and interaction with customer premises equipment). Perhaps most importantly in light of the subtle, technically sophisticated ways in which the merged entity might disfavor non-affiliates, the MOU does not provide a mechanism through which unaffiliated ISPs could verify that they were being treated in a non-discriminatory manner -- for example, a mechanism giving ISPs or a neutral arbitrator a right to review confidential agreements between AOL Time Warner and affiliated ISPs, as well as data on AOL Time Warner's actual network operations.

95. Even if the MOU did not contain these vulnerabilities, we would still be concerned about the proposed merger's potential to harm competition in the market for residential high-speed Internet access services. That is because the MOU is not legally enforceable, and reports regarding the terms of carriage that Time Warner has proposed to certain unaffiliated ISPs raise doubt regarding the company's commitment to implement the principles underlying the MOU on a voluntary basis and in a manner that would avert the merger's harmful effects. According to these reports, Time Warner's proposals to unaffiliated ISPs have conditioned access to Time Warner's cable network on (i) a co-branding presence on the top half of the ISP's home page featuring links to Time Warner content and services; (ii) Time Warner's right to terminate the ISP's carriage if the ISP fails to meet subscription targets set by Time Warner; (iii) Time Warner's right to set the total price for Internet access paid by the ISP's customer; and (iv) a fee consisting of 75 percent of the ISP's subscription revenues, 25 percent of the ISP's cable-access advertising, web-hosting, and e-commerce revenues, a $50,000 up-front deposit, and a minimum monthly payment of $30 for each customer that switches from an ISP affiliated with Time Warner to the unaffiliated ISP.[285] Time Warner contends that these conditions are not unreasonable and merely replicate the business model that governs its provision of cable service.[286] Time Warner points out, for

[285] *See* Letter from Stephen Heins, Director of Marketing, NorthNet, to Magalie Roman Salas, Secretary, FCC, dated Oct. 6, 2000 (containing Term Sheet proposal of Time Warner to NorthNet ("NorthNet Term Sheet")); Confidential Appendix IV-A-2, Notes 5 and 8; *see also* Brian Williams & Jim Wagner, *Cable Contracts Belie Time Warner Assurances*, INTERNETNEWS, Oct. 2, 2000; Cathy Yang, *ISPs to AOL Time Warner: You Call This Open Access?*, BUSINESS WEEK, Sept. 29, 2000.

[286] *See* Letter from Arthur H. Harding, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Oct. 30, 2000 (Time Warner Oct. 30 Ex Parte) at 1-2.

example, that it already sets the price for video programming supplied to consumers even though much of the programming is supplied by unaffiliated entitities.[287] Likewise, it shares advertising revenues with video programmers in the form of local advertising "spots" that programmers reserve for Time Warner's use.[288] Notwithstanding Time Warner's explanation of these provisions, we believe that these conditions conflict with the principles of non-discrimination and "open access" underlying the MOU. Particularly troubling are the pricing conditions. As we discuss in the Confidential Appendix, these conditions may well prevent unaffiliated ISPs from profitably offering service over AOL Time Warner's systems.[289] To the extent that they do so, the conditions flatly contradict the most basic commitment of the MOU, namely that "Consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to enjoy high-speed Internet access services over AOL Time Warner cable systems."[290]

96. Although we conclude that the MOU by itself constitutes an insufficient safeguard against potential discrimination by AOL Time Warner against unaffiliated ISPs on its cable network, we believe that FTC Consent Agreement will substantially mitigate the risk of such discrimination. That decree requires, among other things, that AOL Time Warner open its cable systems on a non-discriminatory basis to at least three unaffiliated ISPs -- the first of which, EarthLink, must begin offering service on Time Warner's cable systems before AOL itself may do so; and the latter two, which remain as-yet undetermined, must have secured agreements to offer service on Time Warner's cable systems within 90 days of the time that AOL itself commences service on those systems.[291] The FTC Consent Agreement further stipulates that the FTC pre-approve the agreements between AOL Time Warner and each of the three unaffiliated ISPs to be granted immediate access to Time Warner cable systems, and that the agreements themselves include detailed safeguards protecting these ISPs against discrimination by AOL Time Warner on the basis of affiliation.[292] Additionally, the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith, and enter into arms' length commercial agreements, with any other unaffiliated ISPs seeking access to its cable systems; and it forbids AOL Time Warner from declining to negotiate or enter such agreements, or from imposing terms and conditions in such agreements, based on ISPs' non-affiliation with the merged firm.[293] The FTC Consent Agreement also requires AOL Time Warner to provide any unaffiliated ISP on its cable system with the same point of connection to its cable network that the merged firm provides to affiliated ISPs, should an unaffiliated ISP request access to that connection point.[294]

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[287] *See id.*

[288] *See id.*

[289] *See* Confidential Appendix IV-A-2, Notes 5 & 6.

[290] MOU at 1 ¶ 2.

[291] FTC Consent Agreement at II.A-D; FTC Press Release at 2-3.

[292] In particular, the FTC Consent Agreement mandates that the agreements between AOL Time Warner and each of the three unaffiliated ISPs include a "most favored nation" clause requiring that if AOL executes an agreement with another cable provider for carriage of AOL, the unaffiliated ISP be given an opportunity to "opt in" to the same rates and terms secured by AOL in its agreement with the other cable provider. FTC Consent Agreement at II.C.1; FTC Press Release at 3. The FTC Consent Agreement also requires that the agreements between AOL Time Warner and each of the three unaffiliated ISPs include requirements that AOL Time Warner provide the same levels of service and network flow data to the unaffiliated ISPs as it does to its affiliated ISPs. FTC Consent Agreement at II.C.2-3.

[293] FTC Consent Agreement at II.E; FTC Press Release at 3.

[294] FTC Consent Agreement at III.B; FTC Press Release at 4.

97. We are convinced that the foregoing requirements will substantially ensure that unaffiliated ISPs are able to offer their services over AOL Time Warner's cable system on non-discriminatory terms and conditions. However, we are concerned that AOL Time Warner will have insufficient incentives to enter contracts with local or regional ISPs that are unaffiliated with the merged firm. We note that the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith with any unaffiliated ISP seeking access to its cable systems. Therefore, we reiterate here that AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner.[295] The requirements we discuss below regarding choice of ISPs, first screen, billing, technical performance, and disclosure of contracts are particularly relevant to the ability of smaller ISPs to negotiate carriage arrangements on non-discriminatory terms, and we expect that AOL Time Warner will negotiate in good faith to reach contract provisions that are consistent with the commercial viability of these entities.

98. In addition, the record in this proceeding reveals several indirect means through which the merged firm could afford preferential treatment based on affiliation to ISPs on its cable systems that are not expressly proscribed by the FTC Consent Agreement. In particular, commenters have expressed concern that AOL Time Warner would condition access to its cable systems on an ISP's placement of Time Warner content on its first screen.[296] Commenters have also expressed concern that AOL Time Warner would preclude ISPs on its cable systems from establishing direct billing relationships with subscribers, even when those ISPs were responsible for acquiring the subscribers in the first place.[297] These measures, even if imposed in a facially neutral manner on affiliated and unaffiliated ISPs, would in fact disadvantage unaffiliated ISPs alone: affiliated ISPs would suffer neither from placement of Time Warner content on their first screen nor from the absence of a direct billing relationship with subscribers, as any revenue they "lost" from these measures would be made up by the parent company. Accordingly, we will impose narrowly tailored conditions, described below, to prevent AOL Time Warner from disadvantaging unaffiliated ISPs on its cable systems through such indirect means.

99. Commenters have also expressed concern that AOL Time Warner would discriminate against unaffiliated ISPs on its cable network in the technical performance it affords to these ISPs.[298] In

[295] *See* note 497, *infra*.

[296] *See, e.g.*, NorthNet Oct. 10 Ex Parte at 4; *see also* Disney Reply Comments at 14. *But see* Applicants' Responses to Written FCC Questions Dated August 25, 2000 Concerning the February 29, 2000 Memorandum of Understanding and Multiple ISP Access ("Applicants' Aug. 25 MOU Responses") at 13, transmitted by letter from Craig A. Gilley, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Sept. 6., 2000.

[297] *See, e.g.*, EarthLink Oct. 18 Ex Parte at 2; *cf.* NorthNet Oct. 10 Ex Parte at 4 (discussing efforts by Time Warner cable to assert control over customer relationship in negotiations with unaffiliated ISPs for access to Time Warner cable systems). *But see* Applicants' Aug. 25 MOU Responses at 15 (promising that "each ISP offered on [Time Warner cable] systems will have the opportunity to establish direct billing relationships with customers").

[298] *See, e.g.*, Disney Reply Comments at 12-13; NorthNet Oct. 10 Ex Parte at 5-7; *see also* Letter from Richard Cotton, Executive Vice President and General Counsel, and Diane Zipursky, Vice President, Washington Law and Policy, National Broadcasting Company, Inc., to Magalie Roman Salas, Secretary, FCC, dated July 24, 2000 ("NBC July 24 Ex Parte") at 3-6 (discussing means of technological discrimination available to cable providers). One commenter also complains that installing AOL's software (versions 5.0 and 6.0) alters users' computer settings, preventing or impeding them from accessing other ISPs. Letter from Kenneth F. Yates, Esq., Yates and Schneider, to Magalie Roman Salas, Secretary, FCC, dated Dec. 26, 2000, at 1-2. Yates, writing on behalf of a class of competing ISPs that have filed a class-action law suit against AOL regarding this issue, claims that AOL is acting anticompetitively by writing its software in the aforementioned manner. Yates requests that we require AOL to modify its software to avoid automatically changing a user's default dial-up number. *See id.* at 3. However, Yates

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particular, commenters fear that AOL Time Warner would provide unaffiliated ISPs with inferior Quality of Service mechanisms, caching capability, technical support, multicasting capability, address management, and other technical functionality of the cable system that affects customers' experience with their ISP. Although we believe that the FTC Consent Agreement would prohibit AOL Time Warner from entering into contract terms that discriminated on the basis of affiliation with respect to technical performance, we note that the decree does not explicitly forbid AOL Time Warner from actually providing inferior technical performance to unaffiliated ISPs where no contract term governs. We are convinced that discrimination against unaffiliated ISPs with respect to technical performance would be sufficiently harmful to such ISPs that a remedy is warranted. Accordingly, we will impose a condition requiring AOL Time Warner, in all contracts with unaffiliated ISPs for access to its cable networks, to warrant that it will not discriminate on the basis of affiliation with respect to technical performance.

100. Finally, we also impose two additional conditions. First, we will prohibit AOL Time Warner from restricting the ability of current or prospective customers to select and initiate service from any unaffiliated ISP that has contracted for access to the merged firm's cable systems; and we will require AOL Time Warner to provide customers who contact Time Warner cable representatives seeking Internet access services with a neutral means of selecting an ISP (that is, a means that does not discriminate in favor of affiliated ISPs on the basis of affiliation). Second, we will prohibit AOL Time Warner from entering into any contract with an ISP for connection with AOL Time Warner's cable systems that prevents that ISP from disclosing the terms of the contract to the Commission under the Commission's confidentiality procedures. Both conditions, we conclude, are necessary to fully effectuate the commitment to non-discriminatory treatment of unaffiliated ISPs that the Applicants have undertaken in the MOU and that the FTC Consent Agreement substantially accomplishes.

(ii) Potential Discrimination Against Unaffiliated ISPs on non-AOL Time Warner Cable Networks

101. ACA, in its initial comments, expressed concern that the proposed merger would give AOL Time Warner the incentive and the ability to require other cable operators to carry AOL's Internet access services as a condition of obtaining Time Warner video programming.[299] ACA sought a commitment from the Applicants that they would not engage in such tactics.[300] Subsequently, Time Warner representatives stated at the Commission's en banc hearing in this proceeding that the merged firm would not condition access to its programming on carriage of AOL.[301] ACA then released a statement indicating its satisfaction with the Applicants' pledge.[302]

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does not allege that the proposed merger would affect in any way AOL's incentives with regard to how it writes its dial-up software. Additionally, as noted, the allegations regarding AOL's dial-up software are the subject of pending litigation. For these reasons, we do not believe that this proceeding is the appropriate forum to resolve concerns about AOL's dial-up service, and we decline to impose the requested merger condition.

[299] ACA Comments at 1-2.

[300] *Id.;* ACA Reply Comments at 5.

[301] *See* Testimony of Richard D. Parsons, President, Time Warner Inc., FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000), Tr. at 178-79 ("Parsons En Banc Testimony"). In response to Commissioner Tristani's question as to whether AOL Time Warner would require carriage of AOL services as a condition of access to Time Warner programming, Mr. Parsons replied, "We will not. We will not tie them together in that way. We had thought . . . we were clear in our previous submissions. Obviously, we weren't. . . [but] we're being unequivocal now. We will not tie them." *Id; see also* Applicants' Reply Comments at 44-46 (stating that it would not be in Time Warner's best
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102. While we commend Time Warner for its representations at the en banc hearing, we remain concerned that the merger would give AOL Time Warner the incentive to seek exclusive or preferential carriage rights for AOL on non-Time Warner cable systems. The merged company would have an incentive to pursue such arrangements wherever preferential carriage rights were essential to the success of its entry strategy for AOL Plus, or wherever it encountered difficulty obtaining carriage rights altogether.[303] If the merged firm's efforts on behalf of AOL were to induce anticompetitive behavior by other cable operators regarding carriage of non-AOL Time Warner ISPs, the public interest would clearly be harmed.[304]

103. We find it unnecessary to address AOL Time Warner's ability to obtain exclusive or preferential carriage rights for AOL, however, because we are satisfied that the FTC Consent Agreement adequately addresses the potential harm with which we are concerned. In particular, the decree prohibits AOL Time Warner from entering into any agreement with a cable provider that would interfere with the cable provider's ability to enter into an agreement with another ISP.[305] This provision will prevent AOL Time Warner from entering agreements with other cable providers that would restrict the rates, terms, or conditions of service that these providers could offer to ISPs competing with AOL.

(iii) Potential Harms to Diversity of Internet Content

104. Several commenters, notably Disney and NBC, argue that a merged AOL Time Warner could utilize its control over high-speed distribution to favor its affiliated content and to discriminate against unaffiliated content providers,[306] thus limiting the public's access to a diversity of information sources.[307] According to the commenters, such discrimination could be accomplished through router

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interest to limit the reach of its programming by tying it to carriage of AOL; other programming in the marketplace would then replace Time Warner's programming).

[302] ACA, *American Cable Association Backs Time Warner/AOL Merger* (press release), July 27, 2000.

[303] *Cf.* Confidential Appendix IV-A-1, Note 1; *id.* IV-A-2, Note 2.

[304] We are mindful that efforts by AOL Time Warner to obtain carriage for the merged company's ISP on the networks of other cable providers would not necessarily be harmful to the public interest. Indeed, such efforts could facilitate the deployment of advanced telecommunications capability to all Americans and promote the existence of a diversity of information sources in cyberspace. As such, these efforts could benefit the public interest, so long as they did not induce anticompetitive behavior by other cable providers.

[305] FTC Consent Agreement at III.E.

[306] By "unaffiliated content providers," we mean content providers in which the merged firm has no ownership interest or contractual relationship.

[307] Disney Reply Comments at 2; NBC July 24 Ex Parte at 5-6; Letter from Henry L. Bauman et al., Legal Department, National Association of Broadcasters, to William E. Kennard, Chairman, FCC, dated May 19, 2000 ("NAB May 19 Ex Parte"), at 2-3. On May 10, 2000, Senators Mike DeWine and Herb Kohl sent a letter to FCC Chairman William Kennard and FTC Chairman Robert Pitofsky expressing similar concerns. In addition, several individuals who use AOL and Road Runner filed comments objecting to alleged instances of censorship by these ISPs. *See* Petition To Deny of Thomas Lewis Bonge, dated Sept. 15, 2000 ("Bonge Petition"), at 10-13 (claiming that Road Runner deleted as unauthorized commercial speech petitioner's chat room posting referencing an Internet music site), transmitted by letter from Thomas Lewis Bonge to FCC, dated Sept. 15, 2000; Letter from James D. Russell, Ph.D., to Magalie Roman Salas, Secretary, FCC, dated Aug. 22, 2000 ("Russell Letter") at 1-2 (claiming that AOL deleted as hate speech certain postings concerning Vice Presidential candidate Joseph Lieberman); Letter from Frank Messman to Magalie Roman Salas, Secretary, FCC, dated Aug. 24, 2000 ("Messman Letter") at 1 (same). These commenters also allege that Road Runner and AOL have cancelled the accounts of users who posted
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technology in a way that would be undetectable to consumers. For example, routers could be programmed to provide high bit rates and superior customer performance for AOL Time Warner channels, programs and services, and slower bit rates and inferior customer performance for content provided by unaffiliated sources.[308] In addition, Disney asserts that AOL, as a condition for purchasing placement on the AOL website, requires that content providers disable hyperlinks to unaffiliated websites (including other areas of the content providers' own web sites), and requires a commitment that no more than a set percentage of traffic at a site within the AOL network can be "diverted," via links, to sites outside the AOL network.[309] If these claims are valid, the merger could harm consumers by enhancing AOL Time Warner's incentive and ability to limit access to Internet content not affiliated with the merged company.

105. The Applicants assert that their primary economic incentive is to increase subscribership by distributing the widest possible variety of content to the widest possible audience, and that therefore they have no incentive to discriminate against unaffiliated content providers.[310] With respect to Disney's argument in particular, the Applicants emphasize that AOL does not restrict a user's ability to reach any site on the World Wide Web by typing in a URL.[311]

106. The record in this proceeding provides some evidence that AOL already seeks to limit its members' access to unaffiliated content on the World Wide Web. For example, AOL requires that content appearing on AOL websites have only a limited number of hyperlinks to unaffiliated content.[312] Furthermore, while it is true that AOL users can access unaffiliated content by typing the URL for any site on the World Wide Web into the AOL browser, a user must know the correct URL in order to complete that operation, and must take the time to do so -- factors which, Disney and NBC maintain, make typing a URL an inadequate substitute for clicking a hyperlink.[313]

107. Nevertheless, we decline to impose the remedial conditions proposed by Disney and NBC, for two reasons. First, as we discuss below, we believe that if unaffiliated ISPs receive non-discriminatory access to Time Warner cable systems -- a result effectuated by the FTC Consent

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messages deemed unacceptable by the ISPs. *See* Bonge Petition at 11-12; Russell Letter at 1-2; Messman Letter at 1. They ask the Commission to prohibit AOL Time Warner from restricting ISP users' speech. While we recognize the importance of citizens' ability to freely communicate with each other, this proceeding is not the appropriate forum for the resolution of the complex legal and policy questions that these commenters present. The aforementioned commenters have not alleged that the merger will in any way affect AOL's or Road Runner's ability or incentive to regulate users' speech. Accordingly, we do not address these issues further in this proceeding, and we reject the aforementioned commenters' proposed merger conditions.

[308] *See* Disney Reply Comments at 12-14; Disney Oct. 25 Ex Parte at 4-5; Consumers Union Comments at 105-07.

[309] Disney July 25 Ex Parte at 19.

[310] Applicants' Reply Comments, *passim*.

[311] Applicants' Reply Comments at 2, 36-40.

[312] *See* Disney July 25 Ex Parte at 19. Disney states that "AOL consistently demands that companies purchasing space on the AOL website desist from including links to websites outside the walled garden . . . . At times, AOL requires a commitment that no more than a set percentage of traffic at a site within the AOL network can be 'diverted' from there via links to sites outside the AOL Network." *Id.*

[313] NBC contends that a merged company could steer consumers to affiliated content by "only providing direct links to affiliated programming, and even by downgrading the speed with which consumers can access certain web sites." NBC July 24 Ex Parte at 6; *see also* Disney July 25 Ex Parte at 19.

Agreement, and reinforced by certain conditions we impose in this proceeding -- the merged firm's incentive and ability to withhold unaffiliated content from its subscribers will be substantially mitigated. Second and relatedly, the FTC Consent Agreement explicitly forbids AOL Time Warner from interfering in any way with content passed through Time Warner cable conduits being used by unaffiliated ISPs that have contracted for access to them.[314] These provisions ensure that unaffiliated ISPs on Time Warner's cable systems will have unimpeded access to unaffiliated content should they choose to provide it -- thus effectively ensuring that Time Warner cable subscribers will have access to such content as well.

108. Other commenters, especially BellSouth and SBC, argue that a combined AOL Time Warner would have both the incentive and the ability to discriminate against alternative, non-cable platforms for high-speed Internet service (such as DSL) by withholding valuable affiliated content from ISPs that utilize these alternative platforms, especially in areas served by Time Warner cable systems.[315] Were the combined company to discriminate in this manner, these commenters allege, competing ISPs (as well as competing high-speed platforms) would be placed at a disadvantage, thereby limiting consumers' ability to choose among varied and diverse sources of broadband Internet content.[316]

109. The Applicants maintain in response that their commitment to maximizing subscribership means that AOL Time Warner would distribute its own affiliated content on all high-speed Internet platforms, including DSL, satellite, and wireless.[317]

110. The record in this proceeding demonstrates that the Applicants contemplate giving some popular Time Warner programming and content exclusive placement on AOL websites.[318] It further demonstrates that the Applicants contemplate moving certain Time Warner content from unaffiliated portals to AOL's portal.[319] The merger would certainly enhance AOL's ability to secure exclusive contracts for Time Warner content, and AOL would have an incentive to grant such exclusivity due to the competitive advantage it would gain by offering popular content on an exclusive basis. Although there are thousands of content sources on the World Wide Web, Internet users look to a relatively limited number of sources to access that content.[320] This proposition is demonstrated by the dominance of a small number of major portals (led by AOL) in terms of Internet traffic.[321]

111. Notwithstanding the likelihood that the proposed merger would lead to AOL's securing exclusive or preferential access to some Time Warner content, we find the record insufficient to justify a requirement of "equal access" to such content. In particular, we are not persuaded that AOL's ability to obtain exclusive or preferential access to such content in the wake of the merger would harm the public interest in a manner sufficiently grave to warrant the remedy commenters seek, which is far-reaching.

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[314] FTC Consent Agreement at III.A; FTC Press Release at 4.

[315] SBC Comments at 19-22; BellSouth Reply Comments at 14-18.

[316] SBC Comments at 19-22; BellSouth Reply Comments at 14-18.

[317] Applicants' Reply Comments, *passim*.

[318] *See* Confidential Appendix IV-A-2, Note 9.

[319] *Id.*

[320] BellSouth Reply Comments at 9.

[321] Internet traffic for the top 50 digital media and web properties, measured in terms of "unique visitors" per month, is tracked by Media Metrix at http://www.mediametrix.com/home.jsp?language=us.

112. Finally, we believe that the AOL Time Warner's incentive and ability to engage in Internet "content discrimination" will be largely mitigated if unaffiliated ISPs are given non-discriminatory access to Time Warner's cable systems, as the FTC Consent Agreement requires. Were AOL Time Warner to withhold desirable unaffiliated content from subscribers to its affiliated ISPs (as Disney and NBC fear), these subscribers would be able to select an alternative, unaffiliated ISP on Time Warner's cable network without incurring substantial switching costs. And were AOL Time Warner to withhold desirable affiliated content from subscribers to unaffiliated ISPs on competing platforms (as BellSouth and SBC fear), it would sacrifice a potentially significant source of revenue. Therefore, we find that commenters' concerns with respect to potential "content discrimination" are adequately addressed by the provisions in the FTC Consent Agreement and this Order ensuring that unaffiliated ISPs receive non-discriminatory access to Time Warner cable systems.

(iv) Potential Harms to Unaffiliated Broadband Platforms

113. Commenters claim that the proposed merger would impair the viability of DSL as a competitive alternative to cable for the delivery of residential high-speed Internet access services.[322] Based on the record in this proceeding, we do not believe that the merger would threaten the continued existence of DSL. We do find, however, that the merger could undermine the availability of residential high-speed Internet access services over DSL by creating an incentive for AOL Time Warner to steer cable customers seeking Internet access in Time Warner service areas to the cable platform. Nonetheless, we are satisfied that this outcome will be averted by the requirements of the FTC Consent Agreement.

114. Cable operators have been early leaders in deploying residential high-speed Internet access services. Cable's early rollout encouraged deployment of alternative platforms; as the Commission has observed, the expansion of DSL in the past two years by incumbent LECs "is primarily a reaction to other companies' entry into broadband."[323] As of November 2000, cable retained a substantial edge over DSL as measured by the number of residential subscribers to each platform.[324]

115. AOL currently markets its high-speed Internet access service ("AOL Plus") over DSL through non-exclusive strategic alliances with SBC (including Ameritech) as well as Bell Atlantic and GTE (both now components of Verizon Communications).[325] Taken together, AOL's agreements with these companies give it an almost nationwide DSL footprint.[326] AOL's effort to obtain such a nationwide

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[322] *See, e.g.*, SBC Comments at 21-22; BellSouth Reply Comments at 15, 21-22; Consumers Union Comments at 33.

[323] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.-96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd at 3696, 3840 n.642 (1999). In the past two years, numerous companies have made substantial investments in DSL. For example, SBC Corp. has announced its intention to invest $6 billion in an infrastructure deployment throughout its 13 state region, in order to make DSL available to nearly 77 million homes. SBC Communications, Inc., *SBC Set to Trial DSL Neighborhood Broadband Gateways* (press release), Aug. 23, 2000; *see also* SBC Communications, Inc., *SBC Launches $6 billion Broadband Initiative* (press release), Oct. 18, 1999.

[324] As of November 2000, there were an estimated 3 million residential cable modem customers in the United States compared with approximately 1,160,000 residential DSL subscribers. *See* Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://www.cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000); *see also* TeleChoice, Inc., *TeleChoice DSL Deployment Summary – Updated 11/13/00*, at http://www.xdsl.com/content /resources/deployment_info.asp (visited Nov. 14, 2000).

[325] Applicants' March 21 Supplemental Information at 17.

[326] Applicants' Third Response at 11-12 & ex.3.16; *see also* Confidential Appendix IV-A-2, Notes 1 and 10.